No. 7879

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United States
Circuit Court of Appeals

For the Ninth Circuit.

CLEVE W. VAN DYKE,

Appellant,

vs.

BASCOM PARKER,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index Page

Index

Index

ATTORNEYS OF RECORD

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Attorneys for Appellant.
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Attorneys for Appellee. [3*]

In the United States District Court for the District of Arizona

L-202-Globe

BASCOM PARKER,

Plaintiff,

vs.

HOVAL A. SMITH and CLEVE W. VAN DYKE,

Defendants.

COMPLAINT

Comes now the above named plaintiff by GRAHAM FOSTER, his attorney, and complaining of the above named defendants, alleges:

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

I.

That plaintiff is a citizen of the State of Michigan; that defendants, HOVAL A. SMITH and CLEVE W. VAN DYKE, are citizens and residents of the State of Arizona; that plaintiff is not a citizen or resident of the state of which either of the defendants are citizens or residents; that the amount of the matter in controversy herein between plaintiff and defendant exceeds, exclusive of interest and costs, the sum or value of THREE THOUSAND ($3,000.00) DOLLARS,

FIRST CAUSE OF ACTION

II.

That heretofore and on or about the 30th day of October, 1917, defendants for value received executed and delivered to plaintiff their certain Promissory Note in writing, dated on that day, whereby they promised to pay to plaintiff the sum of FIVE THOUSAND ($5,000.00) DOLLARS on or before the 30th day of December, 1918, at the St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, with interest thereon at the rate of six per cent (6%) per annum from the date of said note, [4] and at the rate of seven per cent (7%) per annum from the date of maturity of said note, and a reasonable attorney's feet, should suit be brought thereon; that plaintiff is the owner and holder of said note.

III.

That the following is a copy of said Promissory Note:

$5,000.00 Chicago, Illinois, October 30, 1917.

On or before December 30, 1918, for value received, I or we, jointly and severally promise to pay to the order of BASCOM PARKER, at THE ST. ANSGAR BANK OF BRUSH, LUBIENS & ANNIS, at its office in St. Ansgar, Iowa, FIVE THOUSAND DOLLARS, with interest from date at Six per cent per annum, payable annually.

It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

No. 23716 (SGD) HOVAL A. SMITH

P. O. Miami, Ariz. CLEVE W. VAN DYKE

and Chicago

ENDORSED: April 14th, 1927, paid hereon by check, $500.00

June 13th, 1927, paid hereon by check, 500.00

IV.

That a reasonable attorney's fee for bringing this suit against defendants upon said Promissory Note is ONE THOUSAND ($1,000.00) DOLLARS.

V.

That there became due and owing plaintiff by defendants thereon, the sum of FIVE THOUSAND ($5,000.00) DOLLARS, with interest at the rate of six per cent (6%) per annum from the 30th day of October, 1917, to the 30th day of December, 1918, and at the rate of seven per cent (7%) per annum thereafter; that payment thereof has been duly demanded; that no part thereof has been paid, except the sum of FIVE HUNDRED ($500.00) DOLLARS on April 14, 1927, and the further sum of FIVE HUNDRED ($500.00) [5] DOLLARS on June 13, 1927, leaving a balance due plaintiff by defendants as of the 30th day of December, 1930, of EIGHT THOUSAND FIVE HUNDRED AND FIFTY ($8,550.00) DOLLARS, besides an attorney's fee of ONE THOUSAND ($1,000.00) DOLLARS.

SECOND CAUSE OF ACTION

VI.

That heretofore and on or about the 30th day of October, 1917, defendants for value received executed and delivered to plaintiff their certain Promissory note in writing, dated on that day whereby they promised to pay the plaintiff the sum of FIVE THOUSAND ($5,000.00) DOLLARS, on or before the 30th day of June, 1919, at the St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, with interest from said date at the rate of six per cent (6%) per annum, and at the

rate of seven per cent (7%) per annum from the date of maturity of said note, and a reasonable attorney's fee should suit be brought thereon; that plaintiff is the owner and holder of said note.

VII.

That the following is a copy of said Promissory Note:

$5,000.00 Chicago, Illinois, Oct. 30, 1917.

On or before June 30, 1919, for value received, I or we, jointly and severally promise to pay to the order of BASCOM PARKER at THE ST. ANSGAR BANK OF BRUSH, LUBIENS & ANNIS, at its office in St. Ansgar, Iowa, FIVE THOUSAND DOLLARS, with interest from date at six per cent per annum, payable annually.

It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

No. 5793 (SGD) HOVAL A. SMITH

P. O. Bisbee, Ariz.

Miami, Arizona CLEVE W. VAN DYKE

ENDORSED: May 21st, 1927, paid

hereon by check, $500.00

July 20th, 1927, by check, 500.00

[6]

VIII.

That a reasonable attorney's fee for the bringing of this suit against defendants upon said Promissory Note is ONE THOUSAND ($1,000.00) DOLLARS.

IX.

That there became due and owing plaintiff by defendants thereon, the sum of FIVE THOUSAND ($5,000.00) DOLLARS, with interest thereon at the rate of six per cent (6%) per annum from the 30th day of October, 1917, to the 30th day of June, 1919, and at the rate of seven per cent (7%) per annum from the 30th day of June, 1919; that payment thereon has been duly demanded; that no part thereof has been paid, except the sum of FIVE HUNDRED ($500.00) DOLLARS, paid by defendants on or about the 21st day of May, 1927, and the further sum of FIVE HUNDRED ($500.00) DOLLARS, paid by defendants on or about the 20th day of July, 1927, leaving a balance due plaintiff by defendants as of the 30th day of December, 1930, of EIGHT THOUSAND FIVE HUNDRED AND TWENTY FIVE ($8,525.00) DOLLARS, besides an attorney's fee of ONE THOUSAND ($1,000.00) DOLLARS.

WHEREFORE, plaintiff prays Judgment against defendants for the sum of NINE THOUSAND FIVE HUNDRED AND FIFTY ($9,550.00) DOLLARS, with interest at the rate of seven per cent (7%) per annum from the 30th day of December, 1918, upon the first cause of action,

and the further sum of NINE THOUSAND FIVE HUNDRED TWENTY FIVE ($9,525.00) DOLLARS, with interest thereon at the rate of seven per cent per annum from the 30th day of December, 1930, upon the second cause of action as heretofore set forth, besides his costs in this cause incurred.

GRAHAM FOSTER
Attorney for Plaintiff.

[Endorsed]: Filed Jan 21 1931 [7]

[Title of Court and Cause.]

DEMURRER

Come now the defendants in the above entitled cause, and demur to plaintiff's First Cause of Action therein upon the following grounds:

I.

Because it appears on the face of the said cause of action that the plaintiff's claim or demand is barred by the statute of limitations, in that, it appears that the supposed cause of action did not accrue to the said plaintiff at any time within four (4) years before the commencement of this action, and, for that reason, the said first cause of action does not state facts sufficient to constitute a cause of action against these defendants.

II.

Because it appears from said First Cause of Action in said complaint that if plaintiff ever

had a cause of action on account of the facts stated in the said First Cause of Action, that the same is barred by the four (4) year statute of limitations, in that, said action is based upon an instrument, in writing, executed without the State of Arizona, as provided by Subdivision 3, Section 2061, Revised Code of Arizona, 1928. [8]

SECOND CAUSE OF ACTION

Come now the defendants in the above entitled cause, and demur to plaintiff's Second Cause of Action therein, upon the following grounds:

I.

Because it appears on the face of the said cause of action that the plaintiff's claim or demand is barred by the statute of limitations, in that, it appears that the supposed cause of action did not accrue to the said plaintiff at any time within four (4) years before the commencement of this action, and, for that reason, the said second cause of action does not state facts sufficient to constitute a cause of action against these defendants.

II.

Because it appears from said Second Cause of Action in said complaint that if plaintiff ever had a cause of action on account of the facts stated in the said Second Cause of Action, that the same is barred by the four (4) year statute of limitations, in that, said action is based upon an instrument, in writing, executed without the State of Arizona,

as provided by Subdivision 3, Section 2061, Revised Code of Arizona, 1928.

WHEREFORE, defendants pray that said demurrers be sustained.

CHARLES L. RAWLINS
GEO. H. RAWLINS
W. E. BROOKS
Attorneys for Defendants
Globe, Arizona.

I hereby certify that in my opinion the foregoing demurrers are well-founded in point of law, and are not interposed for delay.

CHARLES L. RAWLINS
Attorney for Defendants.
Globe, Arizona.

[Endorsed]: Filed Mar 7 1931. [9]

[Title of Court.]

November 1930 Term At Tucson

MINUTE ENTRY OF APRIL 27, 1931
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

ORDER SUSTAINING DEMURRER.

Defendants' Demurrer to Plaintiff's Complaint having heretofore been argued, submitted and by the Court taken under advisement, and the Court hav-

ing duly considered the same, and being fully advised in the premises,

IT IS ORDERED that said Defendants' Demurrer to Plaintiff's Complaint be, and the same is hereby sustained, and that an exception be entered on behalf of the Plaintiff.

IT IS FURTHER ORDERED that the Plaintiff be allowed twenty days from this date within which to amend his Complaint. [10]

[Title of Court and Cause.]

SECOND AMENDED COMPLAINT

Comes now the above named plaintiff, by GRAHAM FOSTER, his attorney, and complaining of the above named defendants, alleges:

FIRST CAUSE OF ACTION

I.

That plaintiff is a citizen of the State of Michigan; that defendants, HOVAL A. SMITH and CLEVE W. VAN DYKE, are citizens and residents of the State of Arizona; that plaintiff is not a citizen or resident of the state of which either of the defendants are citizens or residents; that the amount of the matter in controversy herein between plaintiff and defendants exceeds, exclusive of interest and costs, the sum or value of THREE THOUSAND ($3,000.00) DOLLARS.

II.

That heretofore and on or about the 30th day of October, 1917, defendants for value received executed and delivered to plaintiff at Chicago, State of Illinois, their [11] certain promissory Note in writing, dated on that day at Chicago, Illinois, whereby they promised to pay to plaintiff the sum of FIVE THOUSAND ($5,000.00) DOLLARS on or before the 30th day of December, 1918, at the St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, with interest thereon at the rate of six per cent (6%) per annum from the date of said note, and at the rate of seven per cent (7%) per annum from the date of maturity of said note if not paid when due, and a reasonable attorney's fee, should suit be brought thereon.

III.

That the following is a copy of the said Promissory Note:

$5,000.00 Chicago, Illinois, October 30, 1917.

On or before December 30, 1918, for value received, I or we, jointly and severally promis to pay to the order of BASCOM PARKER, at THE St. ANSGAR BANK OF BRUSH, LUBIENS & ANNIS, at its office in St. Ansgar, Iowa, FIVE THOUSAND DOLLARS, with interest from date at Six per cent per annum, payable annually.

It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may

be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

No. 23716 (SGD) HOVAL A. SMITH
P. O. Miami, Ariz. CLEVE W. VAN DYKE
and Chicago

ENDORSED: April 14th, 1927, paid hereon by check $500.00
June 13th, 1927, paid hereon by check, $500.00

[12]

IV.

That thereafter and on or about the 1st day of January, 1927, the defendant, CLEVE W. VAN DYKE, acknowledged the justness of the claim of the plaintiff upon said Promissory Note in a writing signed by him.

V.

That the following is a copy of said writing referred to in the preceding paragraph:

January 1, 1927

Mr. Hoval A. Smith
Care Senator Ralph H. Cameron,
Senate Office Building,
Washington, D. C.

My dear Hoval:

Mr. Bascom Parker, of Niles, Michigan, arrived in Miami a few days ago asking the set-

tlement of two notes of $5,000 each, given to him Chicago August 30, 1917, in payment for his stock in the Calhoun Timber Company. You will recall this deal.

This stock was purchased for the remaining stockholders of the company at the request of Mr. H. C. Olcott, acting for the trustees of the bondholders of the Calhoun Timber Company. The amount to be paid for this stock was $50,000; $25,000 of which was to be in Calhoun Timber Company bonds which were owned by the Calhoun Timber Company and $10,000 in cash, and $15,000 in three $5,000 notes. These notes were to be the joint obligation of yourself, Mr. Lubiens and myself. The cash paid to Mr. Parker was a check against the $100,000 fund in the St. Ansgar Bank which we had borrowed from Thomas F. Cole, of New York. These notes were to have been paid when due. One of them came due in the following June and was sent out to me to Miami for collection. I paid this note. The two other notes have never been paid and form the basis of a demand on the part of Mr. Parker for payment at this time.

The stock was delivered and was transferred on the books of the company. One third of the stock was delivered to yourself, one third to R. C. Lubiens, and one third to myself. After the company became defunct the $100,000 owed to Thomas F. Cole became due and as you know

I have paid this sum, so that puts me now in the [13] position of having paid $15,000 or the $25,000 that was owing to Mr. Parker. After the first note was paid the other two notes were taken over by the St. Ansgar Bank, through Lubiens. Later on one of them was sent to me for collection by the St. Ansgar Bank. I refused to pay the same at the time because I had already paid the share due from me and later I paid a further sum of $10,000 which was the original cash paid to Mr. Parker.

The notes were returned to the St. Ansgar Bank from the Gila Valley Bank of Miami, the bank to whom they were sent for collection. The refusal was based upon the grounds that I did not owe the money, that the stock had been turned over to Mr. Lubiens and that he owed the money for the amount due, as I had paid by share in full.

Later on there were some differences between the St. Ansgar Bank on this Calhoun Timber Company matter and yourself and myself. Mr. Lubiens, who was the treasurer of the company, and who was mutually trusted by us at the time, and gathered together a lot of notes which he had placed in the bank and which had been signed by us at various times, and for which he had received no consideration and for which the Calhoun Timber Company had received no consideration. In my opinion at the time this matter was brougth to my attention

by you and by Mr. Salisbury, the whole matter was a fraud and that the bank could not hold me for any amount.

Time went on and at your insistence an agreement was reached between ourselves and the St. Ansgar Bank. In order to avoid litigation we agreed to a settlement between the bank and ourselves with the understanding that all notes and obligations were to be included within this settlement. No notice has ever been received by me from the Bank of St. Ansgar or Mr. Lubiens that they had not taken up these notes when they were refused payment by me for the cause stated above. I was under the impression that Mr. Lubiens and bank, having been notified by me that it was their obligation, had assumed these notes and that they were still held by them and was part of the consideration upon which our settlement was based. What was my surprise to learn the other day upon the arrival of Mr. Parker that the bank, instead of including these notes in our settlement as I presumed was being done, had returned the notes to Mr. Parker unpaid. And now Mr. Parker has presented these notes to me for payment.

Now Hoval, I have tried to be patient in this matter, I have tried to be fair; I have assumed more than my share of the obligation of this disasterous enterprise. I have carried the load for you; I have carried the load for

the bank and had paid out practically all the cash money that has been paid out since the final crash of the company. I have secured not one nickel or one dime [14] in salvage from the company and I have gone so far as to pay the $100,000 to Mr. Cole which was a joint obligation of yourself, the bank and myself.

I presumed the bank was trying to adjust this thing fairly and on a basis of equity and trying to clear up a nasty mess. When Mr. Parker arrived I explained to him fully what my relationship to the bank was on these matters. I told him that we now have due and payable a note to them of $10,000. He has notified me that we must not make this payment to the bank until his matter is adjusted.

I am writing you to inform you of the situation. I request now that you feel obliged to Mr. Parker to fulfill my statement to him that we will not pay this note to the Bank of St. Ansgar until the matter is adjusted, in other words I request that you, upon your return to Arizona, stop at St. Ansgar, see Mr. Salisbury and present this matter to him. Mr. Parker would have levied upon this payment that we were about to make to the bank of St. Ansgar had I not stipulated to him as stated above. I suggest that you now have a definite understanding with Mr. Salisbury in reference to this matter. I expect them to treat Mr. Parker as fairly as I have treated them.

Our agreement with Mr. Parker was definite. Our arrangement among ourselves was well understood and Mr. Parker is only asking for his rights and what is legitimate. The fact of the matter is I am very much surprised indeed at the action taken by the bank in this matter, especially after the settlement that has been made between them and us. We were trying to seek a way out of our difficulties and the way out unloaded over a quarter of a million dollars of obligations upon myself, which, while it is unfair, was arranged in order to avoid troublesome litigation and a long period of contest and fighting. As you know, we discussed the matter and we decided that it would take a large sum of money and a long time to work out this litigation. My health was poor, your affairs were involved, times were hard and we felt that we might better make an amicable settlement rather than seek our dues in the court. It may be that Mr. Salisbury does not know about this situation, and if he does not, you should apprise him of it and clarify it as soon as possible.

With kindest personal regards, I am

Yours very truly

CLEVE W. VAN DYKE

[15]

VI.

That the notes referred to in the first paragraph of said writing are the notes set forth in this Sec-

ond Amended Complaint; the one being set forth in the first cause of action herein and the other being set forth in the second cause of action. That the date August 30, 1917, in said writing was a typographical error and should have been October 30, 1917. That the said defendant, CLEVE W. VAN DYKE, referred to and intended to refer to the notes as set forth in this Second Amended Complaint.

VII.

That at said time both of said defendants were without the limits of the State of Arizona; that the defendant, HOVAL A. SMITH, was without the limits of said state for all of said year; that the defendant, CLEVE W. VAN DYKE, was without the limits of said state during said year until approximately September 15, 1927; that he was without the limits of said state for more than nine months during said year; that he was without the limits of said state for more than six months during the year 1928, and for more than four months during the year 1930 prior to August 1st of said year.

VIII.

That thereafter and on or about the 14th day of April, 1927, the defendants paid to plaintiff the sum of FIVE HUNDRED ($500.00) DOLLARS, on account of said Promissory Note; that thereafter and on or about the 13th day of June, 1927, defendants paid plaintiff the further sum of FIVE HUNDRED ($500.00) DOLLARS, on

account of said Promissory Note; that [16] said payments were made to plaintiff in the State of Michigan.

IX.

That plaintiff is the owner and holder of said note; that no part thereof has been paid except the above sums set forth; that One Thousand ($1,000.00) Dollars is a reasonable attorney's fee for bringing suit on said note; that by reason of the aforesaid, there become due and owing by defendants to the plaintiff, the sum of Five Thousand ($5,000.000) Dollars, with interest thereon at the rate of six per cent (6%) per annum, from the 30th day of October, 1917, to the 30th day of December, 1918, and at the rate of Seven per cent (7%) per annum thereafter, besides the sum of One Thousand ($1,000.00) Dollars as an attorney's fee as aforesaid; that no part thereof has been paid except the two payments of Five Hundred ($500.00) Dollars each, leaving a balance due plaintiff by defendants as of the 30th day of December 1930 of Nine Thousand Five Hundred Fifty ($9,550.00) Dollars.

SECOND CAUSE OF ACTION

I.

Plaintiff repeats and re-alleges each and every allegation set forth in paragraph No. I of the First Cause of Action to the same force and effect as if set forth herein verbatim. [17]

II.

That heretofore and on or about the 30th day of October, 1917, defendants, for value received, executed and delivered to plaintiff at Chicago, State of Illinois, their certain Promissory Note in writing, dated on that day at Chicago, Illinois, whereby they promised to pay to plaintiff the sum of Five Thousand ($5,000.00) Dollars on or before the 30th day of January, 1919, at the St. Ansgar Bank of Brush, Lubiens & Annis, at its office at St. Ansgar, Iowa, with interest from said date at the rate of six per cent (6%) per annum until maturity and at the rate of seven per cent (7%) per annum from the date of maturity of said note, if not paid when due, and a reasonable attorney's fee should suit be brought thereon.

III.

That the following is a copy of said Promissory Note:

> $5,000.00 Chicago, Illinois, Oct. 30, 1917
>
> On or before June 30, 1919, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker at The St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.
>
> It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

(Sgd) HOVAL A. SMITH
CLEVE W. VAN DYKE

No. 5793
P. O. Bisbee, Ariz.
Miami, Arizona.

[Endorsed]: May 21st, 1927, paid hereon by check, $500.00
July 20th, 1927, by check, 500.00

[18]

IV.

The plaintiff repeats and re-alleges each and every allegation set forth in No. IV. of the First Cause of Action to the same force and effect as if set forth herein verbatim.

V.

Plaintiff repeats and re-alleges each and every allegation set forth in paragraphs No. V. and VI. of the First Cause of Action to the same force and effect as if set forth herein verbatim.

VI.

Plaintiff repeats and re-alleges each and every allegation set forth in paragraph No. VII of the First Cause of Action to the same force and effect as if set forth herein verbatim.

VII.

That thereafter and on or about the 21st day of May, 1927, the defendants paid to plaintiff the

sum of Five Hundred ($500.00) Dollars, on account of said Promissory Note; that thereafter and on or about the 20th day of July, 1927, the defendants paid plaintiff the further sum of Five Hundred ($500.00) Dollars, on account of said Promissory Note.

VIII.

That plaintiff is the owner and holder of said note; that no part thereof has been paid except the sums above set forth; that One Thousand ($1,000.00) Dollars, is a reasonable fee for bringing suit on said note; that by reason of [19] the aforesaid, there became due and owing, by defendants to plaintiff, the sum of Five Thousand ($5,000.00) Dollars, with interest thereon at the rate of six per cent (6%) per annum from the 30th day of October, 1917, to the 30th day of June, 1919, and at the rate of seven per cent (7%) per annum thereafter, besides the sum of One Thousand ($1,000.000) Dollars as an attorney's fee as aforesaid; that no part thereof has been paid except the two payments of Five Hundred ($500.00) Dollars each, leaving a balance due plaintiff by defendants, as of the 30th day of December, 1930, of Nine Thousand Five Hundred Twenty-five ($9,525.00) Dollars.

WHEREFORE, plaintiff prays judgment against defendants for the sum of Nine Thousand Five Hundred Fifty ($9,550.00) Dollars, besides interest, on Five Thousand ($5,000.00) Dollars, at the rate of seven per cent (7%) per annum from the

30th day of December, 1930, to the entry of Judgment herein as set forth in the First Cause of Action; and for the sum of Nine Thousand Five Hundred Twenty Five ($9,525.00) Dollars, with interest on Five Thousand ($5,000.00) Dollars, at the rate of seven per cent (7%) per annum from the 30th day of December, 1930, to the date of the entry of Judgment herein as set forth in the Second Cause of Action; besides his costs in this cause incurred, and for interest upon said Judgment at the rate of seven per cent (7%) per annum until paid.

GRAHAM FOSTER
Attorney for Plaintiff. [20]

[Endorsed]: Due and timely service of copy of the Second Amended Complaint is hereby admitted this 25 day of August, 1931.

CHAS. L. RAWLINS
Attorney for Defendants.

[Endorsed]: Filed Aug. 26, 1931.

[Endorsed]: Pltf's. Exhibit No. 6, (Notes set out on pages 2 and 8) Admitted and filed Jun 2, 1933.

J. LEE BAKER, Clerk. [21]

[Title of Court and Cause.]

DEMURRER TO FIRST AND SECOND CAUSE OF ACTION OF PLAINTIFF'S SECOND AMENDED COMPLAINT.

Come now the defendants in the above entitled action, and without waiving their rights under their

motion to strike plaintiff's Second Amended Complaint, demur to plaintiff's First Cause of Action of the Second Amended Complaint filed herein, upon the following grounds:

I.

That the said First Cause of Action does not state facts sufficient to constitute a cause of action against the said defendants, or either of them.

II.

Because it appears on the face of said First Cause of Action that the plaintiff's claim or demand is barred by the statute of limitations of this State, to-wit: The provisions of Section 2061, Sub-Division 3, Arizona Civil Code, 1928; in that, it appears that the alleged cause of action did not accrue to the said plaintiff at any time within four years before the commencement of this action, and, for that reason, the said First Cause of Action does not state facts sufficient to constitute a cause of action against these defendants. [22]

III.

Because it appears from said First Cause of Action in said Second Amended Complaint, that if plaintiff ever had a cause of action on account of the facts stated in the said First Cause of Action, that the same is barred by the provisions of Section 2061, Sub-Division 3, Arizona Civil Code, 1928; in that, said action is based upon an instrument in writing executed without the State of Arizona, and

said action was not commenced and prosecuted upon said instrument within four years after the cause of action accrued thereon, as required by the provisions of said Section 2061, Sub-Division 3 thereof.

SECOND CAUSE OF ACTION

Come now the defendants in the above entitled action, and demur to plaintiff's Second Cause of Action of the Second Amended Complaint filed herein, upon the following grounds:

I.

That the said Second Cause of Action does not state facts sufficient to constitute a cause of action against the said defendants, or either of them.

II.

Because it appears on the face of said Second Cause of Action that the plaintiff's claim or demand is barred by the statute of limitations of this State, to-wit: The provisions of Section 2061, Sub-Division 3, Arizona Civil Code, 1928; in that, it appears that the alleged cause of action did not accrue to the said plaintiff at any time within four years before the commencement of this action, and, for that reason, the said Second Cause of Action does not state facts sufficient to constitute a cause of action against these defendants.

III.

Because it appears from said Second Cause of Action in said Second Amended Complaint, that

if plaintiff ever had a [23] cause of action on account of the facts stated in the said Second Cause of Action, that the same is barred by the provisions of Section 2061, Sub-Division 3, Arizona Civil Code, 1928; in that, said action is based upon an instrument in writing executed without the State of Arizona, and said action was not commenced and prosecuted upon said instrument within four years after the cause of action accrued thereon, as required by the provisions of said Section 2061, Sub-Division 3 thereof.

WHEREFORE, defendants pray that said demurrers be sustained, and that said action be dismissed.

CHARLES L. RAWLINS
W. E. BROOKS
GEO. H. RAWLINS
Attorneys for Defendants.

I hereby certify that, in my opinion, the foregoing Demurrers are well-founded in point of law, and are not interposed for delay.

CHARLES L. RAWLINS
Attorney for Defendants.

[Endorsed]: Service of a copy of the within Demurrer accepted this 28 day of August, A. D., 1931.

GRAHAM FOSTER
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 31, 1931. [24]

[Title of Court.]
May 1932 Term At Tucson

MINUTE ENTRY OF JUNE 17, 1932

(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Cause.]

RULING ON DEMURRER.

Defendants' Demurrer to the Second Amended Complaint having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that said Demurrer to the Second Amended Complaint be, and the same is hereby sustained as to the defendant, Hoval A. Smith, and overruled as to the defendant, Cleve W. Van Dyke, and that exceptions be entered on behalf of the plaintiff and the defendant Cleve W. Van Dyke. [25]

[Title of Court and Cause.]

MEMORANDUM RULING.

GRAHAM FOSTER, Esq., Attorneys for Plaintiff; CHARLES L. RAWLINS, Esq., W. E. BROOKS, Esq., and GEORGE H. RAWLINS, Esq., Attorneys for Defendants.

The complaint filed January 21, 1931 shows that

defendants, citizens of Arizona, executed two promissory notes dated at Chicago, Illinois, October 30, 1917, in the principal sum of $5,000.00 each, payable to plaintiff, a citizen of Michigan, at St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa; that one of said notes became due and payable on December 30, 1918 on which two payments by check of $500.00 each, made April 14, 1927 and June 13, 1927 are endorsed thereon, and that the other note became due and payable June 30, 1919, on which two payments by check of $500.00 each, made May 21, 1927 and July 20, 1927, are endorsed thereon. The amended complaint sets forth a copy of a lengthly letter of date January 1, 1927 written by defendant Van Dyke to defendant Smith at Washington, D. C., and alleged to be an acknowledgment of the justness of plaintiff's claim against said defendants on said notes. Absence of the defendants from Arizona (at intervals) since the date of said letter is also alleged. A demurrer to the complaint based on the four year statute of limitations of Arizona on written instruments executed without the state, has been interposed.

Generally in respect to the limitation of actions the law [26] of the forum governs. 37 Corpus Juris, p. 729; 12 Corpus Juris, p. 447.

State statutes of limitation are controlling on the Federal Courts in actions at law instituted in such courts, and the Federal Courts follow the construction given by the highest court of the state to such statutes, such statutes being regarded as "laws of

the several states", which must be regarded as rules of decisions in trials at law within the meaning of Title 28 U. S. C. A., Section 725 (R. S. 721). Note 111 Title 28, Sec. 725 for list of cases.

Sec. 2061 Revised Code of Arizona, 1928, provides as follows:

> "There shall be commenced and prosecuted within four years after the cause of action shall have accrued and not afterwards the following actions: x x 3 x x upon an instrument in writing executed without the state."

The notes matured and the causes of action thereon accrued December 30, 1918 and June 30, 1919, respectively. Action was not commenced in this court until after the expiration of more than eleven years after the notes became due. Subdivision 3 of said Section 2061 is a bar to action on the notes in the Arizona courts, state and federal, unless the payments thereon, as alleged, or the letter of date January 1, 1927, served to revise the causes of action on the notes, or to set the statutes of limitations running anew.

The notes are expressly payable in Iowa and the causes of action thereon accrued there. Where a note is executed in one state and made payable in another, the general rule is that it is governed as to its nature, validity, interpretation and effect by the laws of the state in which it is payable without regard to the place where it was written, signed or dated, it being presumed that the parties contracted with reference to that place. 8 Corpus Juris, 92;

Joffe v. Bonn, 14 Fed. (2d), 50; Abt v. American Trust and Savings Bank, 42 N. E. 856 (Ill.), 50 Am. State Reports, 175 (drafts drawn in Illinois on a New York bank are payable there.)

Section 11018, Code of Iowa, 1927, provides as follows:

> "Causes of action founded on contract are revived by an admission in writing, signed by the party to be charged that the debt is unpaid, or by a like new promise to pay the same." [27]

Under the Iowa statute the common-law rule by which the partial payment of a claim operated to set the period of limitation running anew has been abrogated. Kleis v. McGrath, 103 N. W. 371; Henneman v. Tabor, 200 N. W. 218. (Payment of interest). The payments endorsed on the notes were ineffectual to arrest the running of the statute.

It therefore remains to determine the effect, if any, of the letter alleged to have been written by Mr. Van Dyke to Mr. Smith on January 1, 1927, the pertinent portions of which are quoted as follows:

> "Mr. Bascom Parker of Niles, Michigan, arrived in Miami a few days ago asking settlement of the two notes of $5,000.00 each, given to him at Chicago, August 30, 1917, in payment of his stock in the Calhoun Timber Company" x x x x — ($50,000.00; $25,000.00 in bonds of the company, $10,000.00 in cash and $15,000.00 in three $5,000.00 notes) — "These notes were to be the joint obligation of yourself, Mr. Lu-

biens and myself'' x x x x — ''These notes were to have been paid when due. One of the notes became due in the following June and was sent out to me to Miami for collection. I paid this note. The two other notes have never been paid and form the basis of a demand on the part of Mr. Parker for payment at this time'' x x x x— ''After the first note was paid, the other two notes were taken over by the St. Ansgar Bank, through Lubiens. Later on one of them was sent over to me for collection by the St. Ansgar Bank. I refused to pay the same at the time because I had already paid the share due from me, and later I paid a further sum of $10,000.00 which was the original cash paid to Mr. Parker. The notes were returned to the St. Ansgar Bank from the Valley Bank of Miami, the bank to whom they were sent for collection. This refusal was based on the grounds that I did not owe the money, that the stock had been turned over to Mr. Lubiens and that he owed the money for the amount due as I had paid my share in full'' x x x x (Here follows a recital of some differences between the bank and the defendants, and of transactions of the bank concerning various notes signed by the defendants, which, in the opinion of the writer,—''the whole matter was a fraud and that the bank could not hold me for the amount'' x x x — (Here follows a recital of a settlement with the bank in which all of the notes were to be included in the same and as-

sumed by the bank). x x x x — "What was my surprise to learn x x x x that the bank instead of including these notes in our settlement as I presumed was being done, had returned the notes to Mr. Parker unpaid" x x x x — (Here follows a recital that the writer had assumed more than his share of the enterprise and had carried the load for Smith and the bank and had paid out all of the cash and presumed that the bank was trying to adjust the thing fairly.) —"When Mr. Parker arrived I explained to him fully what my relationship to the bank was in those matters. I told him that we now have due and payable a note to them of $10,000. He has notified me that we must not make this payment to the bank until this matter is adjusted. I am writing you to inform you of the situation. I request now that you feel [28] obligated to Mr. Parker to fulfill my statement to him that we will not pay this note to the Bank of St. Ansgar until the matter is adjusted; in other words, I request that you upon your return to Arizona, stop at St. Ansgar, see Mr. Salisbury and present the matter to him. Mr. Parker would have levied upon this payment that we were about to make to the Bank of St. Ansgar had I not stipulated to him as stated above. I suggest that you now have a definite understanding with Mr. Salisbury in reference to this matter. I expect then to treat Mr. Parker as fairly as I have treated them. Our agreement

with Mr. Parker was definite; our arrangement among ourselves was well understood and Mr. Parker is only asking for his rights and what is legitimate. The fact of the matter is I am very much surprised indeed at the action of the bank in this matter, especially after the settlement that had been made between them and us." — (Here follows a recital of efforts to avoid litigation on indebtedness of over a quarter million dollars.) x x x x

Cleve W. Van Dyke

In the early case of Mahone v. Cooley, 36 Iowa, 483, the Court holds. "The admission of the debt alone is sufficient. It is not regarded as a contract, but is merely a written declaration that the debt is not paid. It is unnecessary that the name of the party to whom made should appear therein. The only object of the law is to secure written evidence attested by the signature of the debtor that the debt is not paid. This is accomplished by a written admission, although it does not show to whom it was made."

It is not necessary, in order to revive a cause of action, that there be both an admission that the debt is not paid and a new promise to pay it, but either is sufficient. Nelson v. Hanson, 60 N. W. 655; Stewart v. McFarland, 50 N. W. 221; Senninger v. Rowley, 116 N. W. 695.

That the admission of the debt alone is sufficient. Will v. Marker, 98 N. W. 487; Doran v. Doran, 123 N. W. 996.

The admission need not be an express one,—it is enough if it clearly and unequivocally refers to the instrument in suit, and clearly admits that it is unpaid. Will v. Marker, supra.

In Senninger v. Rowley, supra, the Court says: "To have the effect of an admission within our statute, it is not required that the writing specifically describe the debt or mention its exact amount, but the identification of the debt and of the amount due may be shown by extrinsic evidence. These rules are too well established to call for a review of the authorities." [29]

It is only necessary that the admission which will revive the action appear with reasonable certainty to relate to the debt in question. Such admission need not be made to the creditor. (Citing cases holding the admission to stranger may be effectual.) Doran v. Doran, supra.

In Bakey v. Moeller, 171 N. W. 289, the court compiles the Iowa cases that hold the writing must, by its terms, either admit or promise to pay some indebtedness of the writer, and that the writing need not, however, specifically identify the indebtedness as that upon which suit is based, and that this may be established by extrinsic evidence. This decision also differentiates the Iowa cases in which the writing was held sufficient from admission held insufficient, pointing out that in each of the former there is a specific reference to a note.

Two New Mexico cases pass upon the sufficiency of an admission under the New Mexico statute, (Comp. Laws, 2926, now Chap. 83-111, 1929) which

has been held to be a copy of the Iowa statute, (Sec. 11018). The court, in Cleland v. Mostetter, 79 Pac. 801, reviews the Iowa decisions, and differentiates the sufficiency of an admission or acknowledgment under the Iowa and New Mexico statute, and the Maryland common-law statute, construed in Shephard v. Thompson, 122 U. S. 232, 7 Sup. Ct. 1229, 30 L. Ed. 1156, in which the court held that the mere acknowledgment of a debt is not sufficient, and points out that New Mexico and Iowa belong to a group of jurisdictions wherein the common-law rule has been modified, and in which it is not necessary that the acknowledgment shall imply a promise to pay; that under the New Mexico and Iowa statutes, an admission of a debt and existing liability is sufficient, even though it is accompanied by words which repel any implication of such a promise.

In Joyce-Pruitt Co. v. Meadows, (N. M.) 203 Pac. 537, the statement of a debtor in his deposition in a former suit that he knew that the debt evidenced by the note sued upon was unpaid was held sufficient. The court holds that the cause of action is revived by the admission alone, and that the admission need not in terms imply a promise or willingness to pay. A definite admission that [30] the debt is unpaid revives the cause of action, irrespective of the intention of the debtor as to payment. It was contended in this case that the admission was ineffective because not made to the creditor, which the court says is an attempt to impose a condition not provided by the statute, citing Doran v. Doran, supra, as in point.

Mr. Van Dyke states in letter of date January 1, 1927, to Mr. Smith, that Mr. Parker asks settlement of two notes of $5,000.00 each, given to Mr. Parker at Chicago, August 30, 1917; that three notes were given to Mr. Parker which were to be the joint obligation of Mr. Smith, Mr. Lubiens and Mr. Van Dyke; that Mr. Van Dyke paid one of the notes, and that the other two have never been paid, and form the basis of Mr. Parker's demand; that the agreement with Mr. Parker was definite and that he is only asking for his rights, and what is legitimate.

Irrespective of the statements in the letter of Mr. Van Dyke's reasons for refusing to pay the notes, or of the assumption of the payment of the same by others, his admission is clear and unequivocal that the two notes for $5,000.00 each, given to Mr. Parker in payment for his stock in the Calhoun Lumber Company are unpaid.

It is clear that the statement signed by Mr. Van Dyke constitutes, as to him, sufficient admission under the statute of Iowa, as interpreted by the courts of that state, to revive the debt, or to set the statute running anew on the notes on which action has been instituted in this court.

The demurrer has been interposed in behalf of both defendants. The acknowledgment by one of several joint debtors will not interrupt the statute of limitations as to the others. 37 Corpus Juris, 1131, Sec. 608.

The demurrer is sustained as to the defendant Smith, and is overruled as to the defendant Van Dyke.

And it is so ordered.

ALBERT M. SAMES,
Judge District Court.

[Endorsed]: Filed Jun. 17, 1932. [31]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant Cleve W. Van Dyke, and answering the complaint of the plaintiff herein alleges:

I.

Denies each and every allegation, matter and thing in said complaint contained.

WHEREFORE, defendant prays that the plaintiff take nothing by his cause of action, and that he have his costs.

CHARLES L. RAWLINS
WM. E. BROOKS
GEO. H. RAWLINS

[Endorsed]: Filed Nov. 15, 1932. [32]

[Title of Court and Cause.]

MOTION FOR REHEARING ON THE DEMURRER.

Comes now the defendant Cleve W. Van Dyke by his attorneys of record and moves this Court that a rehearing be granted upon the Demurrer to First and Second Cause of Action of Plaintiff's Second Amended Complaint for the following reasons:

I.

That a written acknowledgment sufficient to revive the causes of action on the notes, or to set the statute of limitations running anew, must not only identify the debt with certainty but express a willingness to pay it. This doctrine has, since the filing of briefs, been announced by the Supreme Court of the State of Arizona.

II.

That under section 2061 of the 1928 Arizona Civil Code, the statute of limitations in Arizona began to run upon the accrual of the causes of action to wit: at the maturity date of the notes December 30, 1918 and June 30, 1919; and therefore this action was barred in this state four years thereafter on December 30, 1922 and June 30, 1923; and it is immaterial how long a period the notes may be sued upon in Iowa as this cause of action is [33] governed by the law of the forum to wit: section 2061, 1928 Arizona Civil Code.

WHEREFORE, the defendant prays that this

Court grant a rehearing upon the demurrer to first and second cause of action of plaintiff's second amended complaint.

CHAS. L. RAWLINS
WM. E. BROOKS
GEO. H. RAWLINS
Attorneys for defendant.

I, George H. Rawlins, one of the attorneys of record in the above entitled court and cause, hereby certify that in my opinion this is a meritorious motion and not for the purpose of delay.

GEORGE H. RAWLINS
Attorney for Defendant.

[Endorsed]: Filed Dec. 15, 1932. [34]

[Title of Court and Cause.]

OBJECTIONS TO MOTION FOR REHEARING ON THE DEMURRER.

Now comes the above named plaintiff and objects to the granting of the motion heretofore filed by the defendant Cleve W. Van Dyke for rehearing of the demurrer to the first and second causes of action set forth in plaintiff's second amended complaint on the following grounds:

I.

That the Court has no jurisdiction or power to grant said motion for the reason that the term of court at which the order overruling the demurrer

was made had expired before the making of said motion and that the Court can not vacate or set aside its order overruling said demurrer after the expiration of the term at which said order was made.

II.

That the demurrer was fully heard on its merits after full argument and ruled on by the Court after full consideration.

III.

That the ruling of the Court in overruling said demurrer was correct.

KINGAN, DARNELL & NAVE
S. L. PATTEE
Attorneys for Plaintiff. [35]

AFFIDAVIT OF SERVICE OF COPY OF MOTION.

State of Arizona,
County of Pima.—ss.

George R. Darnell, being first duly sworn on oath, states: That he is one of the attorneys for plaintiff in the above entitled action; that on the 10th day of January, 1933; he mailed a copy of the attached objections to motion to attorneys for defendants, Rawlins and Rawlins, Luhrs Tower, Phoenix, Arizona, said copy being enclosed in an envelope addressed to said attorneys at said place, with postage fully prepaid thereon so that said copy in said envelope so contained would be carried by United States mail and delivered to said attorneys.

GEORGE R. DARNELL

Subscribed and sworn to before me this 10th day of January, 1933.

[Seal] ALBERTA GRAHAM
Notary Public.

My commission expires: Jan. 19, 1936.

[Endorsed]: Filed Jan. 10, 1933 [36]

[Title of Court.]

November 1932 Term At Tucson

MINUTE ENTRY OF JANUARY 16, 1933
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Cause.]

ORDER DENYING MOTION FOR REHEARING ON DEMURRER.

Motion of the Defendant Cleve W. Van Dyke for Rehearing on Demurrer to First and Second Cause of Action of the Second Amended Complaint comes on regularly for hearing this day.

George R. Darnell, Esquire, and Samuel L. Pattee, Esquire, appear as counsel for the Plaintiff. George H. Rawlins, Esquire, appears as counsel for the Defendant, Cleve W. Van Dyke.

Argument is now had by respective counsel, and

IT IS ORDERED that said Motion of the De-

fendant Cleve W. Van Dyke for rehearing on Demurrer to First and Second Cause of Action of the Second Amended Complaint be, and the same is hereby denied, to which ruling and order of the Court the Defendant excepts.

Counsel for the respective parties now stipulate that this case may be set, in the absence of counsel, for trial at the next session of Court at Globe. [37]

[Title of Court and Cause.]

A MOTION FOR AN INSPECTION OF NOTES SUED UPON.

Comes now the defendant, Cleve W. Van Dyke, by his attorneys of record, and moves this Court that the defendant and/or his attorneys be given an opportunity, at the earliest convenient date, to inspect the original of those two (2) certain instruments purporting to be promissory notes, one of which is contained in Paragraph (3) of the first cause of action in plaintiff's second amended complaint and the other of which is contained in Paragraph (3) of plaintiff's second cause of action in plaintiff's second amended complaint; one for the sum of Five Thousand ($5,000.000) Dollars, bearing date Chicago, Illinois, October 30, 1917 and payable on or before December 30, 1918 at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa and bearing interest at the rate of six (6%) per cent per annum; and the other for

the sum of Five Thousand ($5,000.00) Dollars, bearing date Chicago, Illinois, October 30, 1917, payable on or before June 30, 1919 at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa and bearing interest at the rate of six (6%) per cent, and signed by Hoval A. Smith and Cleve W. Van Dyke.

I.

That this defendant can not properly prepare an answer to plaintiff's second amended complaint until the defendant and/or [38] his attorneys have inspected the original of said notes for the purpose of ascertaining the authenticity of the signature attached thereto; and for the further reason of examining the dates contained in said notes.

WHEREFORE, defendant prays that this Court enter an Order requiring the plaintiff to produce, for inspection, at the earliest convenient time and at a convenient place, the original of those certain notes set out in Paragraph (3) of first cause of action in plaintiff's second amended complaint, and in Paragraph (3) of the second cause of action in plaintiff's second amended complaint.

CHAS. L. RAWLINS
GEO. H. RAWLINS
WM. E. BROOKS
Attorneys for Defendant.

[Endorsed]: Filed Feb. 21, 1933. [39]

[Title of Court and Cause.]

A MOTION FOR AN INSPECTION OF LETTER.

Comes now the defendant, Cleve W. Van Dyke, by his attorneys of record, and moves this Court that the defendant and/or his attorneys be given an opportunity, at the earliest convenient date, to inspect the original of that certain alleged letter a copy of which is contained in Paragraph (5) of plaintiff's second amended complaint; said original letter being addressed to Mr. Hoval A. Smith, dated January 1, 1927 and signed by Cleve W. Van Dyke in accordance with Paragraph (4464) Revised Code of Arizona, 1928, for the following reasons:

I.

That this defendant can not properly prepare an answer to plaintiff's second amended complaint until the defendant and/or his attorneys have inspected the original of said letter for the purpose of ascertaining the authenticity of the signature attached thereto; and for the further reason of examining the dates contained in said letter as to whether or not there has been a typographical error as alleged in Paragraph (6) of plaintiff's second amended complaint.

WHEREFORE defendant prays that this Court enter an Order requiring the plaintiff to produce, for inspection, at the earliest [40] convenient time and at a convenient place, the original of that cer-

tain letter set out in Paragraph (5) of first cause of action in plaintiff's second amended complaint.

CHAS. L. RAWLINS
GEO. H. RAWLINS
WM. E. BROOKS
Attorneys for Defendant.

[Endorsed]: Filed Jan. 21, 1933. [41]

[Title of Court.]

November 1932 Term At Tucson

MINUTE ENTRY OF JANUARY 30, 1933
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Cause.]

HEARING ON MOTION.

Motion of the defendant, Cleve W. Van Dyke, for an order requiring the plaintiff to produce for inspection the original letter set out in Paragraph (5) of first cause of action in the second amended complaint comes on regularly for hearing this day.

George R. Darnell, Esquire, appears as counsel for the plaintiff. No counsel appears for the defendants.

Said counsel for the plaintiff now states to the Court that the plaintiff is not in possession of the letter described in said motion but that he has a carbon copy thereof only, and consents to an inspection thereof by the defendant. Whereupon,

IT IS ORDERED that such copy be lodged in the office of the Clerk of this Court for the period

of twenty days from this date and that said defendant be permitted to inspect the same in said office. [42]

[Title of Court and Cause.]

AMENDED ANSWER.

Comes now the defendant and amending his answer to the second amended complaint of the plaintiff, alleges:

FIRST CAUSE OF ACTION.

I.

Answering the first cause of action defendant alleges that the first cause of action was commenced and prosecuted on the 21st day of January, 1931, by the filing of a complaint in the office of the Clerk of this Court in Tucson, Arizona, and the issuance of a summons thereon; and, that said cause of action accrued on the 30th of December, 1918, upon the maturing of said promissory note; said promissory note being a written instrument, made and payable without the State of Arizona; and, that this action was commenced and prosecuted more than four (4) years after this cause of action accrued upon a written instrument executed without the State of Arizona, and, therefore, defendant alleges that this cause of action is barred by the Statute of Limitations of the State of Arizona as contained in Subdivision 3, Section 2061 of the 1928 Civil Code of Arizona, which is as follows:

"There shall be commenced and prosecuted within four years after the cause of action shall have accrued and not afterwards the following actions: * * * 3 * * * upon an instrument in writing executed without the State." [43]

II.

Defendant denies each and every allegation, matter and thing contained in plaintiff's complaint.

III.

Defendant alleges for a further defense: that during the year of 1917, the defendant, Hoval A. Smith and R. C. Lubiens were engaged in the promotion and organization of a corporation for the purpose of operating certain properties in the State of Florida; and, that during said year Hoval A. Smith, R. C. Lubiens and this defendant agreed to purchase the interest of the plaintiff in said corporation, a part of the consideration for the purchase of the interest of the plaintiff was the sum of Fifteen Thousand ($15,000.00) Dollars to be evidenced by three promissory notes for Five Thousand ($5,000.00) Dollars each; and, that this plaintiff, Hoval A. Smith, R. C. Lubiens and this defendant agreed with each other that each of the purchasers should each pay the sum of Five Thousand ($5,000.00) Dollars, with interest, and no more, all of which was well known to this plaintiff, and said plaintiff agreed to accept payment as herein set out; that thereafter, the said R. C. Lubiens declined to sign said notes for the reason that he was an active officer in a banking association in

the State of Iowa; and, that the defendant and Hoval A. Smith, at the request of the plaintiff and pursuant to said agreement, this defendant and said Hoval A. Smith, did sign and execute three (3) certain promissory notes for Five Thousand ($5,000.00) Dollars each, payable to the plaintiff; and when said notes became due and payable the said Hoval A. Smith and the defendant failed to make payment; and thereafter, the plaintiff presented to the defendant and requested the payment of one of said notes which note this defendant did pay and the payment of this note, by this defendant, represented defendant's one-third of the purchase price of the plaintiff's interest in said business pursuant to the agreement as aforesaid; that thereafter, between [44] the 8th day of April, 1927 and the 14th day of April, 1927, in the City of Los Angeles, State of California, this plaintiff requested the payment of the two remaining notes by this defendant, at which time the defendant informed this plaintiff that the Statute of Limitations in Arizona had run against said notes and further, that he had paid his pro rata share of the purchase price of the plaintiff's interest in said business in Florida as aforesaid, pursuant to said agreement, all of which was then well known to this plaintiff; whereupon, the plaintiff represented to the defendant that he had been informed that the Statute of Limitations in Arizona had run against said notes and further urged and requested this defendant to make some payment on said remaining promissory notes as they were a total loss to the plaintiff, and that this plaintiff was in great need of money; whereupon the plaintiff pro-

posed that if the defendant would pay the plaintiff One Thousand ($1,000.00) Dollars upon the principal amount of each note the plaintiff would accept the same in full payment, satisfaction, discharge and release of the defendant from all liability upon said promissory notes; and, that thereafter this defendant agreed to pay the said sum of One Thousand ($1,000.00) Dollars upon the principal sum of said promissory notes in consideration of the plaintiff agreeing that said sum of One Thousand ($1,000.00) Dollars upon the principal sum of said promissory notes be paid in installments of Five Hundred ($500.00) Dollars each, payable every thirty (30) days; and, that this plaintiff did then and there accept said defendant's offer and the defendant would pay to the plaintiff the sum of One Thousand ($1,000.00) Dollars on each note in installments of Five Hundred ($500.00) Dollars, at the times and in the manner agreed upon and in accordance with the aforesaid agreement in full satisfaction, payment, discharge and release of said defendant on each of said notes, (as agreed upon by the defendant) as aforesaid, and said payments were received by this plaintiff under said agreement in [45] full payment, satisfaction, release and discharge of this defendant from all liability of every kind or nature upon, or growing out of the said promissory notes.

SECOND CAUSE OF ACTION.

I.

Answering the second cause of action defendant alleges that the second cause of action was com-

menced and prosecuted on the 21st day of January, 1931, by the filing of a complaint in the office of the Clerk of this Court in Tucson, Arizona, and the issuance of a summons thereon; and, that said cause of action accrued on the 30th day of June, 1919, upon the maturing of said promissory note, said promissory note being a written instrument, made and payable without the State of Arizona; and, that this action was commenced and prosecuted more than four (4) years after this cause of action accrued upon written instrument executed without the State of Arizona, and, therefore, defendant alleges that this cause of action is barred by the Statute of Limitations of the State of Arizona, as contained in Subdivision 3, Section 2061 of the 1928 Civil Code of Arizona, which is as follows:

> "There shall be commenced and prosecuted within four years after the cause of action shall have accrued and not afterwards the following actions: x x 3 x x upon an instrument in writing executed without the state."

II.

Plaintiff repeats and re-alleges each and every allegation, matter and thing as set forth in Paragraph (2) of the defendant's answer to the first cause of action, to the same force and effect as if set forth herein verbatim.

III.

Plaintiff repeats and re-alleges each and every allegation, matter and thing as set forth in Paragraph

(3) of the [46] defendant's answer to the first cause of action, to the same force and effect as if set forth herein verbatim.

WHEREFORE, defendant prays that the plaintiff take nothing by his cause of action, and that the defendant have his costs expended herein.

CHAS. L. RAWLINS,
GEO. H. RAWLINS,
WM. E. BROOKS,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 13, 1933. [47]

[Title of Court and Cause.]

PLAINTIFF'S REPLY.

Comes now the above named plaintiff and replying to the amended answer of the defendant, admits and denies as follows:

I.

Admits the allegation in paragraph I of the amended answer to the first cause of action to the effect that the first cause of action was commenced and prosecuted on the 21st day of January, 1931, by the filing of a complaint in the office of the Clerk of this Court in Tucson, Arizona, and the issuance of a summons thereon, but denies all other allegations contained in said paragraph I.

II.

Denies each and every allegation contained in paragraph III of defendant's answer to said first cause of action.

III.

Admits the allegation in paragraph I of defendant's amended answer to the second cause of action to the effect that the second cause of action was commenced and prosecuted on the 21st day of January, 1931, by the filing of a complaint in the office of the Clerk of this Court in Tucson, Arizona, and the issuance of a summons thereon, but denies all other allegations in said paragraph I contained. [48]

IV.

Denies each and every allegation contained in paragraph III of defendant's amended answer to plaintiff's second cause of action.

V.

Denies each and every allegation in said amended answer contained not herein and hereby specifically admitted.

WHEREFORE, plaintiff prays that defendant take nothing by reason of said amended answer, and that plaintiff have judgment and all further relief to the Court just and legal as prayed in plaintiff's second amended complaint.

S. L. PATTEE,
KINGAN, DARNELL & NAVE,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 14, 1933. [49]

[Title of Court and Cause.]

WAIVER OF JURY.

The parties to the above entitled cause hereby waive trial by jury herein and submit the same for hearing and decision by the Honorable Albert M. Sames, Judge in said cause.

RAWLINS & RAWLINS,
WM. E. BROOKS,
Attorneys for Defendants.
S. L. PATTEE,
KINGAN, DARNELL & NAVE,
Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 2, 1933. [50]

[Title of Court.]

May, 1933 Term At Tucson

MINUTE ENTRY OF JUNE 2, 1933.
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

PROCEEDINGS OF TRIAL.

This case comes on regularly for trial this day before the Court sitting without a Jury, a Jury having been expressly waived upon the written stipulation of counsel heretofore filed herein.

The parties herein are present with their counsel. George R. Darnell, Esquire, and Samuel L. Pattee,

Esquire, appear as counsel for the Plaintiff and George H. Rawlins, Esquire, Charles L. Rawlins, Esquire and William E. Brooks, Esquire, appear as counsel on behalf of the Defendant.

Both sides announce ready for trial.

John W. Walker is now duly sworn to report the evidence in this case.

PLAINTIFF'S CASE:

Cleve W. Van Dyke is now sworn and examined on behalf of the Plaintiff under cross-examination.

The Plaintiff, Bascom Parker, is now sworn and examined in his own behalf.

Plaintiff's Exhibit 5, Depositions of Robert E. Proctor, Carson Parker, Annie Parker, Mary Riener and Chloe Dinehart, is now admitted in evidence and read by counsel for the plaintiff.

On motion of George R. Darnell, Esquire, counsel for the Plaintiff, IT IS ORDERED that the Plaintiff be allowed to amend his complaint by interlineation to correctly show letter on pages three, four and five thereof as set out in the deposition of Robert E. Proctor.

And thereupon, at the hour of 11:55 o'clock A. M., IT IS ORDERED that the further trial of this case be continued to the hour of two o'clock [51] P. M. this date, to which time the parties and counsel are excused.

Subsequently, at the hour of two o'clock P. M., the parties and their respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

PLAINTIFF'S CASE CONTINUED:

The following Plaintiff's witnesses are now sworn and examined:

Frances Giacoma

James R. Malott.

The Plaintiff, Bascom Parker, heretofore sworn is now recalled and further examined in his own behalf.

The following Plaintiff's exhibits are now admitted in evidence:

6, copies of notes sued upon herein, on pages two and eight of the second amended complaint.

4, copy of letter dated January 1, 1927 addressed to Hoval A. Smith from Cleve W. Van Dyke.

1, letter dated May 21, 1927, addressed to Bascom Parker, signed: Cleve W. Van Dyke.

2, letter dated June 13, 1927 addressed to Bascom Parker, signed: Cleve W. Van Dyke.

3, letter dated July 15, 1927 addressed to Bascom Parker, signed: Cleve W. Van Dyke.

Cleve Van Dyke, heretofore sworn is now recalled and further examined on behalf of the Plaintiff under cross-examination.

Whereupon, the Plaintiff rests.

DEFENDANT'S CASE:

The defendant, Cleve W. Van Dyke, heretofore sworn, is now called and examined in his own behalf.

And thereupon, at the hour of five o'clock P. M., IT IS ORDERED that the further trial of this case

be continued to Saturday, June 3, 1933 at the hour of 9:30 o'clock A. M., to which time the parties and counsel are excused. [52]

[Title of Court.]

May, 1933 Term At Tucson

MINUTE ENTRY OF JUNE 3, 1935
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

FURTHER PROCEEDINGS OF TRIAL.

The parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

DEFENDANT'S CASE CONTINUED:

The defendant, Cleve W. Van Dyke, heretofore sworn is now recalled and further examined in his own behalf.

The following defendant's witnesses are now sworn and examined:

L. D. Van Dyke.

Hoval A. Smith.

And the Defendant rests.

Counsel for the Defendant now moves for Judgment for the Defendant on all the facts, for the reason that the Plaintiff has failed to establish his cause of action and has failed to prove that the cause of action is not barred by the statute of limi-

tations plead in Defendant's Answer and has failed to prove that the Defendant ever signed any instrument in writing acknowledging the justness of the debt or that the debt is unpaid, and

IT IS ORDERED that said motion be submitted and by the Court taken under advisement.

REBUTTAL:

The Plaintiff, Bascom Parker, heretofore sworn is now recalled and further examined in his own behalf.

Thereupon, the Plaintiff rests. [53]

Both sides rest.

Whereupon, counsel for the Defendant now renews his motion for Judgment for the Defendant, and

IT IS ORDERED that said motion be submitted and by the Court taken under advisement.

Whereupon, IT IS ORDERED that this cause be submitted on briefs and by the Court taken under advisement, and

IT IS FURTHER ORDERED that the Plaintiff be allowed thirty days after filing of the Reporter's Transcript within which to file opening brief; that the Defendant be allowed thirty days thereafter within which to file answering brief and that the Plaintiff be allowed twenty days thereafter within which to file reply brief. [54]

[Title of Court.]

May 1934 Term At Tucson

MINUTE ENTRY OF SEPTEMBER 15, 1934
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Cause.]

This cause having been heretofore tried before the Court sitting without a Jury and submitted and by the Court taken under advisement, and the Court having duly considered the same and being fully advised in the premises,

IT IS ORDERED that the objection of the Defendant to admission of plaintiff's exhibit 4 herein be, and the same is hereby overruled, and that said Defendant's motion for judgment be, and the same is hereby denied, and

IT IS ORDERED that Judgment be entered in favor of the Plaintiff and against the Defendant, and that counsel for the Plaintiff prepare Findings of Fact, Conclusions of Law and Judgment for the signature of the Court in accordance with the Rules of this Court, and

IT IS FURTHER ORDERED that an exception be entered on behalf of the Defendant herein.

[55]

[Title of Court and Cause.]

PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on for trial before the above named Court sitting without a jury, a jury trial having been duly waived by the parties hereto, and was tried on the 2nd and 3rd days of June, 1933, the parties being present in person and by their counsel. The demurrer of the defendant Hoval A. Smith to the second amended complaint having been sustained and the action dismissed as against him, the cause proceeded as against the defendant Cleve W. Van Dyke, and the Court having considered the evidence both oral and documentary offered in behalf of the respective parties and having considered the arguments of counsel submitted in writing, makes the following special findings of fact and conclusions of law respecting the first cause of action set forth in the second amended complaint:

1. That the plaintiff is and was at the time of the commencement of this action a citizen and resident of the State of Michigan and that the defendant Cleve W. Van Dyke is and was at the time of the commencement of this action a citizen of the State of Arizona.

2. That the sum or value of the matter on controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

3. That on the 30th day of October, 1917, the defendants Cleve W. Van Dyke and Hoval A.

Smith made, executed and delivered [56] to the plaintiff their certain promissory note in writing, which note is in the words and figures following:

$5,000.00 Chicago, Illinois,
October 30, 1917.

On or before December 30, 1918, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker, at The St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.

It is agreed, and consent is hereby given, that if sued, a reasonable attorneys' fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

(Sgd) HOVAL A. SMITH
CLEVE W. VAN DYKE

No. 23716
P. O. Miami, Ariz.
and Chicago.

[Endorsed]: April 14th, 1927, paid hereon by check, $500.00

June 13th, 1927, paid hereon by check $500.00
Said note was casually signed and dated at Chicago,

Illinois, but was payable at the bank therein named in the State of Iowa.

4. That said note was given for a valuable consideration and at the time of the commencement of this action the plaintiff was and still is the owner and holder thereof, and that no part thereof has been paid except the sum of One Thousand Dollars ($1,000.00) paid in two installments of Five Hundred Dollars ($500.00) each at the dates set forth in the endorsements thereon.

5. That after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note and expressed a willingness to pay the same in a written instrument in the following words and figures:

January 1, 1927

Mr. Hoval A. Smith
care Senator Ralph H. Cameron,
Senate Office Building,
Washington, D. C. [57]

My dear Hoval:

Mr. Bascom Parker, of Niles, Michigan, arrived in Miami a few days ago asking the settlement of two notes of $5,000 each, given to him Chicago August 30, 1917, in payment for his stock in the Calhoun Timber Company. You will recall this deal.

This stock was purchased for the remaining stockholders of the company at the request of Mr. H. C. Olcott, acting for the trustees of

the bondholders of the Calhoun Timber Company. The amount to be paid for this stock was $50,000; $25,000 of which was to be in Calhoun Timber Company bonds which were owned by the Calhoun Timber Company and $10,000 in cash, and $15,000 in three $5,000 notes. These notes were to be the joint obligation of yourself, Mr. Lubiens and myself. The cash paid to Mr. Parker was a check against the $100,000 fund in the St. Ansgar Bank which we had borrowed from Thomas F. Cole, of New York. These notes were to have been paid when due. One of them came due in the following June and was sent out to me to Miami for collection. I paid this note. The two other notes have never been paid and form the basis of a demand on the part of Mr. Parker at this time.

The stock was delivered and was transferred on the books of the company. One third of the stock was delivered to yourself, one third to R. C. Lubiens, and one third to myself. After the company became defunct the $100,000 owed to Thomas F. Cole became due and as you know I have paid this sum, so that puts me now in the position of having paid $15,000 or the $25,000 that was owing to Mr. Parker. After the first note was paid the other two notes were taken over by the St. Ansgar Bank, through Lubiens. Later on one of them was sent to me for collection by the St. Ansgar Bank. I refused to pay the same at the time

because I had already paid the share due from me and later I paid a further sum of $10,000 which was the original cash paid to Mr. Parker.

The notes were returned to the St. Ansgar Bank from the Gila Valley Bank of Miami, the bank to whom they were sent for collection. The refusal was based upon the grounds that I did not owe the money, that the stock had been turned over to Mr. Lubiens and that he owed the money for the amount due, as I had paid my share in full.

Later on there were some differences between the St. Ansgar Bank on this Calhoun Timber Company matter and yourself and myself. Mr. Lubiens, who was the treasurer of the company. and who was mutually trusted by us at the time, had gathered together a lot of notes which he placed in the bank and which had been signed by us at various times, and for which we had received no consideration and for which the Calhoun Timber Company had received no consideration. In my opinion at the time this matter was brought to my attention by you and Mr. Salisbury, the whole matter was a fraud and that the bank could not hold me for any amount.

Time went on and at your insistence an agreement was reached between ourselves and the St. Ansgar Bank. In order to avoid litigation we agreed to a settlement between the bank and ourselves with the understanding

that all notes and obligations were to be included within this settlement. No notice has ever been received by me from the Bank of St. Ansgar or Mr. [58] Lubiens that they had not taken up these notes when they were refused payment by me for the cause stated above. I was under the impression that Mr. Lubiens and bank, having been notified by me that it was their obligation, had assumed these notes and that they were still held by them and was part of the consideration upon which our settlement was based. What was my surprise to learn the other day upon the arirval of Mr. Parker that the bank, instead of including these notes in our settlement as I presumed was being done, had returned the notes to Mr. Parker unpaid. And now Mr. Parker has presented these notes to me for payment.

Now, Hoval, I have tried to be patient in this matter, I have tried to be fair; I have assumed more than my share of of the obligation of this disastrous enterprise. I have carried the load for you; I have carried the load for the bank and had paid out practically all the cash money *was* has been paid out since the final crash of the company. I have secured not one nickel or one dime in salvage from the company and I have gone so far as to pay the $100,000 to Mr. Cole which was a joint obligation of yourself, the bank and myself.

I presumed the bank was trying to adjust this thing fairly and on a basis of equity and trying to clear up a nasty mess. When Mr. Parker arrived I explained to him fully what my relationship to the bank was on these matters. I told him that we now have due and payable a note to them of $10,000. He has notified me that we must not make this payment to the bank until his matter is adjusted.

I am writing you to inform you of the situation. I request now that you feel obligation to Mr. Parker to fulfill my statement to him that we will not pay this note to the Bank of St. Ansgar until the matter is adjusted. In other words I request that you, upon your return to Arizona, stop at St. Ansgar, see Mr. Salisbury and present this matter to him. Mr. Parker would have levied upon this payment that we were about to make to the bank of St. Ansgar had I not stipulated to him as stated above. I suggest that you now have a definite understanding with Mr. Salisbury in reference to this matter. I expect them to treat Mr. Parker as fairly as I have treated them. Our agreement with Mr. Parker was definite. Our arrangement among ourselves was well understood and Mr. Parker is only asking for his rights and what is legitimate. The fact of the matter is I am very much surprised indeed at the action taken by the bank in this matter, especially after the settlement that has been made between them

and us. We were trying to seek a way out of our difficulties and the way out unloaded over a quarter of a million dollars of obligations upon myself, which, while it is unfair, was arranged in order to avoid troublesome litigation and a long period of contest and fighting. As you know, we discussed the matter and we decided that it would take a large sum of money and a long time to work out this litigation. My health was poor, your affairs were involved, times were hard and we felt that we might better make an amicable settlement rather than seek our dues in the court. It may be that Mr. Salisbury does not know about this situation, and if he does not, you should apprise him of it and clarify it as soon as possible.

With kindest personal regards, I am

Yours very truly,

CLEVE W. VAN DYKE. [59]

That the promissory note set forth in Finding 3 is one of the promissory notes mentioned and described in the foregoing instrument.

6. That immediately prior to the first day of January, 1927, the date upon which said instrument was written, the plaintiff presented said promissory note to the defendant Cleve W. Van Dyke and demanded payment thereof. That on said first day of January, 1927, the defendant Cleve W. Van Dyke in the presence of the plaintiff dictated to his secretary the instrument bearing date on that day and the same was taken down in shorthand and on

said day written out in typewriting and the name of the defendant Cleve W. Van Dyke was written at the end thereof in typewriting. As soon as the same had been written out in typewriting a carbon copy thereof was delivered by the said defendant Cleve W. Van Dyke to the plaintiff. That the said defendant Van Dyke informed the plaintiff that he intended to send the original or ribbon copy of said instrument to the defendant Hoval A. Smith, but in fact never did send it but retained it in his possession. That the said defendant Cleve W. Van Dyke intended to adopt and did adopt his name written in typewriting at the foot of said instrument as his signature, and did thereby sign the same.

7. Thereafter and on the 14th day of April, 1927, the defendant Cleve W. Van Dyke paid the plaintiff upon the said note the sum of $500.00, and on June 13th, 1927, paid the plaintiff on said note the further sum of $500.00, making $1,000.00 in all. That such payments were intended and agreed to be, and in fact were payments upon the promissory note aforesaid and not a sum agreed upon in settlement of any liability on said note.

8. That between the first day of January, 1927, and the time of the commencement of this action the defendant Cleve W. [60] Van Dyke was absent from the State of Arizona and in the State of California for different periods aggregating more than six months.

9. With respect to the second cause of action set forth in the complaint, Findings 1 and 2 re-

lating to the First Cause of Action are adopted without here repeating them.

10. That on the 30th day of October, 1917, the defendants, Cleve W. Van Dyke and Hoval A. Smith made, executed and delivered to the plaintiff their certain promissory note in writing, which note is in the words and figures following:

$5,000.00 Chicago, Illinois,
Oct. 30, 1917

On or before June 30, 1919, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker at The St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.

It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

(Sgn) HOVAL A. SMITH
CLEVE W. VAN DYKE

No. 5793
P. O. Bisbee, Ariz.
Miami, Arizona.

[Endorsed]: May 21st, 1927, paid hereon
by check $500.00
July 20th, 1927, by check 500.00

Said note was casually signed and dated at Chicago, Illinois, but was payable at the bank therein named in the State of Iowa.

11. That said note was given for a valuable consideration and at the time of the commencement of this action the plaintiff was and still is the owner and holder thereof, and that no part thereof has been paid except the sum of One Thousand Dollars ($1,000.00) paid in two installments of Five Hundred Dollars ($500.00) each at the dates set forth in the endorsements thereon.

12. That after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note and expressed a [61] willingness to pay the same in the written instrument which is set forth in Finding No. 5 upon the First Cause of Action and is one of the promissory notes mentioned and described in said written instrument.

13. That immediately prior to the first day of January, 1927, the date upon which said instrument was written, the plaintiff presented said promissory note to the defendant Cleve W. Van Dyke and demanded payment thereof. That on said first day of January, 1927, the defendant Cleve W. Van Dyke in the presence of the plaintiff dictated to his secretary the instrument bearing date on that day and the same was taken down in shorthand and on said day written out in typewriting and the name of the defendant Cleve W. Van Dyke was written at

the end thereof in typewriting. As soon as the same had been written out in typewriting a carbon copy thereof was delivered by the said defendant Cleve W. Van Dyke to the plaintiff. That the said defendant Van Dyke informed the plaintiff that he intended to send the original or ribbon copy of said instrument to the defendant Hoval A. Smith, but in fact never did send it but retained it in his possession. That the said defendant Cleve W. Van Dyke intended to adopt and did adopt his name written in typewriting at the foot of said instrument as his signature, and did thereby sign the same.

14. Thereafter and on the 14th day of April, 1927, the defendant Cleve W. Van Dyke paid the plaintiff upon said note the sum of $500.00, and on June 13th, 1927, paid the plaintiff on said note the further sum of $500.00, making $1,000.000 in all. That such payments were intended and agreed to be and in fact were payments upon the promissory note aforesaid and not a sum agreed upon in settlement of any liability on said note.

15. That between the first day of January, 1927, and the time of the commencement of this action the defendant Cleve W. [62] Van Dyke was absent from the State of Arizona and in the State of California for different periods aggregating more than six months.

16. That both of said promissory notes were lost since the commencement of this action and the same

cannot be found after diligent search and inqury, but that the evidence establishes the form and language of said notes as set forth in the foregoing findings.

17. The Court further finds that a reasonable attorneys' fee for the bringing of this action upon both of said notes and prosecuting the same to judgment on behalf of the plaintiff is the sum of Two Thousand Dollars ($2,000.00).

As CONCLUSIONS OF LAW the Court Finds:

1. That the promissory notes set forth in the first and second cause of action are not, nor is either of them, barred by the statute of limitations of the State of Iowa or the State of Arizona, but that the same are now valid and subsisting obligations.

2. That the instrument dated January 1st, 1927, written and signed by the defendant Cleve W. Van Dyke is a sufficient memorandum in writing signed by the said defendants to arrest the running of the statute of limitations and to start the period of limitations to running anew.

3. That the absences of the defendant Cleve W. Van Dyke from the State of Arizona prevented the operation of the statute of limitations during the period of such absences, and that neither of said notes was barred by limitations.

4. That the plaintiff is entitled to judgment against the defendant Cleve W. Van Dyke for the sum of Ten Thousand Dollars ($10,000.00), being

the principal of said two promissory notes, with interest at the rate of seven per cent (7%) per annum from the maturity thereof as therein provided until [63] paid, less the sum of One Thousand Dollars ($1,000.00) paid upon each of said notes, and for a reasonable attorneys' fee in the amount fixed by the Court, and for the costs of this action.

Let judgment be entered accordingly.

Dated October ....., 1934.

.....

United States District Judge,
District of Arizona.

[Endorsed]: Filed Oct. 2, 1934. [64]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME FOR DEFENDANT CLEVE W. VAN DYKE TO FILE OBJECTIONS TO PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IT IS STIPULATED by and between the attorneys for the plaintiff and Cleve W. Van Dyke, defendant in the above entitled matter, that the defendant may have up to and including the 19th day of October, 1934, to file objections to plaintiff's proposed Special Findings of Fact and Conclusions of Law.

Dated this 8th day of October, 1934.

DARNELL & NAVE,
S. L. PATTEE,
Attorneys for Plaintiff.
CHARLES L. RAWLINS,
GEO. H. RAWLINS,
THOMAS W. NEALON,
Attorneys for Defendant,
Cleve W. Van Dyke.

[Endorsed]: Filed Oct. 9, 1934. [65]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR DEFENDANT CLEVE W. VAN DYKE, TO FILE OBJECTIONS TO PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

UPON STIPULATION of the plaintiff and defendant, Cleve W. Van Dyke, acting by their respective attorneys,

IT IS HEREBY ORDERED that the defendant, Cleve W. Van Dyke, shall have up to and including the 19th day of October, 1934, to file objections to plaintiff's proposed Special Findings of Fact and Conclusions of Law in the above entitled matter.

Dated at Tucson, Arizona, this 10th day of October, 1934.

ALBERT M. SAMES,
United States District Judge.

[Endorsed]: Filed Oct. 10, 1934. [66]

[Title of Court and Cause.]

OBJECTIONS OF DEFENDANT CLEVE W. VAN DYKE TO PLAINTIFF'S PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

COMES NOW the defendant, Cleve W. Van Dyke, and files these, his objections to the proposed special Findings of Fact and Conclusions of Law filed by the plaintiff herein.

I.

This defendant objects to Finding of Fact numbered 3 upon the ground that the same does not show that said promissory note was delivered to the plaintiff herein at Chicago, Ill., on said October 30, 1917, and that said Finding of Fact should recite the delivery thereof to the plaintiff at Chicago, Ill. on that date.

II.

This defendant objects to Finding of Fact numbered 4, upon the ground that the same is not supported by the evidence nor by any evidence in that there is no evidence to sustain that part of the finding reading as follows:

> "and that no part thereof has been paid except the sum of One Thousand Dollars ($1,000.00) paid in two installments of Five Hundred Dollars ($500.00) each at the dates set forth in the endorsements thereon."

That on the contrary, the uncontradicted evidence shows that the payments made by the defendant Van

Dyke to plaintiff Parker were made in pursuance of an agreement and understanding entered into by and between them in the state of California, and the payments were made in settlement of all controversy between [67] them and as a matter of compromise; that therefore, this finding should be confined to the fact that the note was given for a valuable consideration and at the time of the commencement of this action the plaintiff was the owner and holder thereof, but for a valuable consideration and as a matter of compromise plaintiff had released defendant Van Dyke from all liability thereon, said compromise having been entered into after the right to recover upon said instrument had been barred by the statutes of limitations of the state of Arizona.

III.

This defendant objects to that portion of proposed Finding of Fact numbered 5 reading as follows:

> "That after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note and expressed a willingness to pay the same in a written instrument in the following words and figures: * * *"

upon the ground that the same is not sustained by any evidence and is contrary to the evidence; that the letter of January 1, 1927 contains neither an acknowledgment of the justness of the claim of plaintiff as of January 1, 1927, nor any implied or

express promise or willingness to pay the same, and therefore the finding in this respect is contrary to the evidence; that the evidence expressly shows that on January 1, 1927, plaintiff agreed that the defendant Van Dyke would pay no more notes to the St. Ansgar Bank until the St. Ansgar Bank took up the notes set up in plaintiff's amended complaint, and that this was the extent of the agreement between them, and was so understood and interpreted by the plaintiff herein and this defendant at the time that the instrument referred to in this Finding was dictated by this defendant; and this defendant further objects to that portion of proposed Finding of Fact numbered 5 setting up said instrument, upon the ground that [68] the instrument set up therein is not the same as the instrument introduced in evidence in that the instrument introduced in evidence was a carbon copy of an uncompleted original which had a blank space above the typewritten name of "Cleve Van Dyke" and the same was not signed by Cleve W. Van Dyke.

IV.

This defendant objects to proposed Finding of Fact numbered 6 in that the same is not sustained by the evidence and is contrary to the evidence in that said evidence shows that while said letter mentioned therein was written out in typewriting by the stenographer of defendant Cleve W. Van Dyke, that the stenographer left a blank space at the end of said letter after the words "Yours very truly" and above the typewritten name of "Cleve W. Van

Dyke", so that if said letter met with the approval of said defendant Van Dyke he could sign his name thereto in ink, and that the typist merely typed in the name "Cleve W. Van Dyke" under the space left for his signature as is customary in typing letters from dictation so that the recipient of a letter would have no trouble in reading the written signature thereto; that the original letter to Hoval A. Smith was never signed by the defendant Van Dyke, nor ever forwarded to said defendant Hoval A. Smith, and that by agreement between plaintiff and this defendant some telegram to said Hoval A. Smith was sent in place of the letter; that there is no evidence whatsoever that Cleve W. Van Dyke intended to adopt or did adopt his name as written in in typewriting at the foot of said instrument below the space left for his signature, as his signature, and he did not adopt, ratify or sign the same.

V.

This defendant objects to proposed Finding of Fact numbered 7 upon the ground that the same is not sustained by the [69] evidence, and that the evidence shows that this defendant on the 14th day of April, 1927, paid to the plaintiff herein the sum of $500.00 and on June 13, 1927 paid the plaintiff a further sum of $500.00 in settlement of all claims and liability on said note, the said note at that time having been barred by the statutes of limitations of the State of Arizona and for that reason this defendant paid said sum as a compromise of a dis-

puted liability, and that such payments were intended by the defendant and accepted by the plaintiff herein in full settlement of any liability of the defendant that might have existed upon said note.

VI.

This defendant objects to proposed Finding of Fact numbered 8 in that the same is incomplete and that the same should show that at all times since the 1st day of January, 1927, this defendant Cleve W. Van Dyke was and is a resident of the State of Arizona, and that at no time during said period was he a non-resident of the State of Arizona; that his absences from the state were at all times temporary visits to the state of California and that he had at all times during said period maintained his home in the town of Miami, State of Arizona.

VII.

This defendant objects to proposed Finding of Fact numbered 10 upon the ground that the same does not show that said promissory note was delivered to the plaintiff herein at Chicago, Ill., on said October 30, 1917, and that said Finding of Fact should recite the delivery thereof to the plaintiff at Chicago, Ill. on that date.

VIII.

This defendant objects to Finding of Fact numbered 11 upon the ground that the same is not supported by the evidence [70] nor by any evidence in

that there is no evidence to sustain that part of the finding reading as follows:

> "and that no part thereof has been paid except the sum of One Thousand Dollars ($1,000.00) paid in two installments of Five Hundred Dollars ($500.00) each at the dates set forth in the endorsements thereon."

That on the contrary, the uncontradicted evidence shows that the payments made by the defendant Van Dyke to plaintiff Parker were made in pursuance of an agreement and understanding entered into by and between them in the state of California, and the payments were made in settlement of all controversy between them and as a matter of compromise; that therefore, this finding should be confined to the fact that the note was given for a valuable consideration and at the time of the commencement of this action the plaintiff was the owner and holder thereof, but for a valuable consideration and as a matter of compromise plaintiff had released defendant Van Dyke from all liability thereon, said compromise having been entered into after the right to recover upon said instrument had been barred by the statutes of limitations of the state of Arizona.

IX.

This defendant objects to proposed Finding of Fact numbered 12, upon the ground that the same is not sustained by any evidence and is contrary to the evidence; that the letter of January 1, 1927,

set up in plaintiff's proposed Finding No. 5, contains neither an acknowledgment of the justness of the claim of plaintiff as of January 1, 1927, nor any implied or express promise or willingness to pay the same, and therefore the finding in this respect is contrary to the evidence; that the evidence expressly shows that on January 1, 1927, plaintiff agreed that the defendant Van Dyke would pay no more notes to the St. Ansgar Bank until the St. Ansgar Bank took up the notes set up in plaintiff's amended Complaint, and that this was the extent of [71] the agreement between them, and was so understood and interpreted by the plaintiff herein and this defendant at the time that the instrument referred to in this finding was dictated by this defendant; and this defendant further objects to said proposed Finding of Fact numbered 12 upon the ground that the instrument referred to therein is not the same as the instrument introduced in evidence in that the instrument introduced in evidence was a carbon copy of an uncompleted original which had a blank space above the typewritten name of "Cleve W. Van Dyke" and the same was not signed by Cleve W. Van Dyke.

X.

This defendant objects to proposed Finding of Fact numbered 13 in that the same is not sustained by the evidence and is contrary to the evidence in that said evidence shows that while said letter mentioned therein was written out in typewriting by the stenographer of defendant Cleve W. Van Dyke,

that the stenographer left a blank space at the end of said letter after the words "Yours very truly" and above the typewritten name of "Cleve W. Van Dyke", so that if said letter met with the approval of said defendant Van Dyke he could sign his name thereto in ink, and that the typist merely typed in the name "Cleve W. Van Dyke" under the space left for his signature as is customary in typing letters from dictation so that the recipient of a letter would have no trouble in reading the written signature thereto; that the original letter to Hoval A. Smith was never signed by the defendant Van Dyke, nor ever forwarded to said defendant Hoval A. Smith, and that by agreement between plaintiff and this defendant some telegram to Hoval A. Smith was sent in place of the letter; that there is no evidence whatsoever that Cleve W. Van Dyke intended to adopt or did adopt his name as [72] written in in typewriting at the foot of said instrument below the space left for his signature, as his signature, and he did not adopt, ratify or sign the same.

XI.

This defendant objects to proposed Finding of Fact numbered 14 upon the ground that the same is not sustained by the evidence, and that the evidence shows that this defendant on the 21st day of May, 1927, paid to the plaintiff herein the sum of $500.00 and on July 20, 1927 paid the plaintiff a further sum of $500.00 in settlement of claims and liability on said note, the said note at that time having been

barred by the statutes of limitations of the State of Arizona and for that reason this defendant paid said sum as a compromise of a disputed liability, and that such payments were intended by the defendant and accepted by the plaintiff herein in full settlement of any liability of the defendant that might have existed upon said note.

XII.

This defendant objects to proposed Finding of Fact numbered 15 in that the same is incomplete and that the same should show that at all times since the 1st day of January, 1927, this defendant Cleve W. Van Dyke was and is a resident of the State of Arizona, and that at no time during said period was he a non-resident of the State of Arizona; that his absences from the state were at all times temporary visits to the state of California and that he had at all times during said period maintained his home in the town of Miami, State of Arizona.

XIII.

This defendant further objects to plaintiff's proposed findings of fact upon the ground that the same are incomplete and do not correctly present the facts proven by [73] the evidence introduced at the hearing, and that the findings of fact to be made by the court in this cause should include:

1. That the promissory notes set up in plaintiff's amended complaint were pledged by the plaintiff herein as security for a loan to the St. Ansgar Bank long prior to January 1, 1927, and that at that time were in possession of the St. Ans-

gar Bank as pledgee thereof to secure a loan made thereon by the plaintiff in this action; that when defendant Van Dyke made his settlement with said bank of transactions that had occurred between him and said bank theretofore, the said notes so pledged to the bank by the plaintiff were included in the settlement by Van Dyke, but the said bank failed to pay to the plaintiff any sums that might be due him above his loan as was provided for in Van Dyke's settlement with said bank.

2. That the original of the carbon copy of the letter set up in plaintiff's amended complaint was dictated to his stenographer by defendant Van Dyke and a blank space was left after the words "Yours very truly" and above the typewritten name "Cleve W. Van Dyke" so that the same might be signed by defendant Van Dyke if he so desired; that the original of the letter set up in plaintiff's amended complaint was never signed by defendant Van Dyke nor sent to Hoval A. Smith, but instead there was sent a telegram of some nature to Smith by Van Dyke; that defendant Van Dyke did not dictate his name to the stenographer as the same appears at the bottom of the carbon copy thereof; that the defendant Van Dyke never instructed his stenographer to sign his name by typewriter or otherwise to the original or carbon of the letter set up in plaintiff's amended complaint, nor did he ratify or adopt the said typewritten name as his signature. [74]

3. That the writing described in plaintiff's amended complaint dated January 1, 1927, and

purporting to be a carbon copy of an instrument written by the stenographer of the defendant Van Dyke was understood by the plaintiff as a recital of the terms of an oral agreement entered into between the defendant Van Dyke and plaintiff on that date, in which said defendant Van Dyke agreed with the plaintiff that he, Van Dyke, would pay no more money to the St. Ansgar Bank on any obligation of his (Van Dyke's) to the said St. Ansgar Bank until the said bank took up the two notes set up in plaintiff's amended Complaint, then pledged to the said St. Ansgar Bank as security for money loaned to the plaintiff by said bank; that the understanding of the defendant Van Dyke was the same as that of the plaintiff as expressed by the plaintiff in the following language: "Mr. Van Dyke agreed with me that he would not pay any of those notes at the St. Ansgar Bank until they took up my two notes".

4. That on January 1, 1927, defendant Van Dyke agreed with plaintiff that he, Van Dyke, would pay no more notes to the St. Ansgar Bank until the St. Ansgar Bank took up the two notes set up in plaintiff's amended complaint.

5. That at the time of the execution of the two notes set up in plaintiff's complaint and at all times thereafter up to and including the date of the filing of this action, defendant Van Dyke was and is a resident of the State of Arizona, and at no time subsequent to the 1st day of January, 1927, was he a non-resident of the state of Arizona. [75]

OBJECTIONS TO PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW.

I.

Defendant, Cleve W. Van Dyke, objects to plaintiff's proposed Conclusion of Law numbered 1 upon the ground that it is dual and should be separate conclusions, and upon the ground that that part of Conclusion of Law numbered 1 to the effect that the promissory notes set forth in the first and second cause of action are not barred by the statute of limitations of the state of Iowa is erroneous in that the complaint shows upon its face that the action was not brought within the time prescribed by the statutes of Iowa for bringing such action, nor is there any allegation in the complaint that defendant Van Dyke was a non-resident of Arizona at any period prior to the bringing of said action; and upon the ground that the proposed conclusion of law to the effect that the action upon said promissory notes is not barred by the statute of limitations of the state of Arizona is erroneous in that it appears upon the face of the complaint and from the evidence that more than four years had expired prior to the accrual of the cause of action upon said promissory notes, and that therefore the same are barred by the statute of limitations of the state of Arizona, and particularly by Sections 2062 and 2068 of the Civil Code of Arizona, 1928.

II.

Defendant, Cleve W. Van Dyke, objects to plaintiff's proposed Conclusion of Law numbered 2 upon

the ground that the same is erroneous in stating that the instrument dated January 1, 1927, and set up in plaintiff's amended complaint, is a sufficient memorandum in writing to arrest the running of the statute of limitations and to start the period of limitations to running anew, in that said instrument was never written nor [76] signed by Cleve Van Dyke nor adopted nor ratified by him and was not ratified by him in writing, and the alleged signature thereto not having been signed or adopted by him the same does not constitute a memorandum in writing signed by the defendant within the meaning of Section 2068, Revised Code of Arizona, 1928, and the said instrument does not contain either an express or implied promise by the defendant Cleve W. Van Dyke that he would pay the alleged debt nor does it contain an acknowledgment of the justness of the alleged debt as of the time of the execution of said instrument, nor that it was a valid and subsisting obligation of his; nor does it express any willingness upon his part to pay the same.

III.

Defendant Cleve W. Van Dyke objects to proposed Conclusion of Law numbered 3 upon the ground that the same is erroneous in that none of the absences of defendant Van Dyke, nor all of them, would have the legal effect of perfecting the operation of the statute of limitations nor of extending the time for the bringing of the action herein, and that therefore said conclusion of law is totally unnecessary and improper.

IV.

Defendant Cleve W. Van Dyke objects to plaintiff's proposed Conclusion of Law numbered 4 upon the ground that it rests upon no basis of facts pleaded or proven, as neither the facts pleaded nor proven entitle the plaintiff herein to a judgment against said Cleve W. Van Dyke for the said sum of $10,000.00 and interest or any sum whatsoever, as the alleged cause of action is barred by the statutes of the state of Arizona as shown by both pleading and evidence and that the evidence further shows that after the said cause of action was barred by the statutes of Arizona that all the claims of the plaintiff as against the defendant Cleve W. Van Dyke were settled [77] by a compromise agreement entered into in California for the sum of $2,000.00, which said sum of $2,000.00 was paid; there existing at that time a dispute between the parties as to the justness of the claim and as to the right of the plaintiff to bring the action by reason of the same being barred by the statute of limitations of the state of Arizona.

V.

This defendant further objects to plaintiff's proposed Conclusions of Law in that they are not complete, and further conclusions of law should be made to comport with the evidence received on the trial of the cause and the pleadings; that among the conclusions of law this defendant suggests as necessary the following:

1. That the demurrer of this defendant to plaintiff's second amended complaint should be sustained upon the ground that the same does not state sufficient facts to constitute a cause of action under the laws of Arizona, in that it appears that the attempted causes of action therein stated are barred by the provisions of Section 2062 of the Civil Code of Arizona, 1928, and that no facts are pleaded sufficient to constitute a new cause of action under and by virtue of the provisions of Section 2068 of said Civil Code of Arizona, 1928.

2. That the evidence introduced at the trial is insufficient to sustain the allegations of plaintiff's second amended complaint.

3. That this action is governed by the statutes of limitation of the state of Arizona, the law of the forum in which the action has been brought.

4. That the written instrument set up in plaintiff's second amended complaint dated January 1, 1927, is to be governed in its construction by the law of the forum in which the action is brought.

[78]

5. That both the plaintiff and defendant are bound by their understanding of the instrument dated January 1, 1927, which appears in plaintiff's second amended complaint, and the construction that each of them placed upon said instrument at the time that it was dictated by the defendant Van Dyke to his stenographer.

6. That said instrument if properly executed

would not be sufficient to enable the plaintiff herein to maintain this cause of action under the provisions of Section 2068 of the Civil Code of Arizona, 1928, in that the same neither admits the justness of the debt or subsisting liability thereon as of January 1, 1927, nor contains any promise, express or implied, upon the part of defendant Van Dyke to pay the same nor any willingness to pay the same.

7. That the instrument set up in plaintiff's second amended complaint, dated January 1, 1927, is not such an acknowledgment of the existence of the debt as is allowed to remove the bar of the statute on the theory that such acknowledgment or admissions carry with it an implied promise to pay, for the reason that under the construction of the Iowa statute by the Supreme Court of that state, the acknowledgment must be express, clear and direct, for it will not do to infer or imply the acknowledgment, and therefrom imply the promise to pay, thus piling implication upon implication.

8. That there was an accord and satisfaction of the controversy between the plaintiff and defendant Van Dyke, when the defendant Van Dyke paid to the plaintiff herein the sums of money amounting to $2,000.00 in the year 1927.

9. That the defendant Cleve W. Van Dyke is entitled to a judgment against the plaintiff herein that said plaintiff take nothing by his said second amended complaint, [79] and that the defendant

Cleve W. Van Dyke have judgment against the plaintiff for his costs herein incurred.

CHARLES L. RAWLINS
GEORGE H. RAWLINS
THOMAS W. NEALON
Attorneys for Defendant,
Cleve W. Van Dyke.

[Endorsed]: Filed Oct. 18, 1934. [80]

[Title of Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW BY DEFENDANT CLEVE W. VAN DYKE.

The Court makes the following Findings of Fact and Conclusions of Law in the above entitled and numbered cause:

FINDINGS OF FACT.

I.

That the plaintiff is, and was at the time of the commencement of this action, a citizen and resident of the state of Michigan, and that the defendant, Cleve W. Van Dyke, is, and was at the time of the commencement of this action, a citizen of the state of Arizona.

II.

That the sum or value of the matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

III.

That on the 30th day of October, 1917, the defendants, Cleve W. Van Dyke and Hoval A. Smith, at Chicago, Illinois, made, executed and delivered to the plaintiff herein the two promissory notes set up in plaintiff's second amended complaint, said notes being payable at the St. Ansgar Bank of Brush, Lubiens & Annis, in St. Ansgar, Iowa.

IV.

That the payee of said notes, plaintiff in this action, [81] pledged said notes as collateral security for a loan obtained by him from the said St. Ansgar Bank of Brush, Lubiens & Annis, and while the notes were so pledged by plaintiff, the defendant Cleve W. Van Dyke made a statement thereof with the pledgee; that all of this occurred long prior to the 1st day of January, 1927.

V.

That in the year 1927, the defendant, Cleve W. Van Dyke claiming in good faith that the statute of limitations had run against the two notes and that no action could be maintained by the plaintiff thereon, entered into an agreement with the plaintiff herein to compromise the controversy between them as to the liability thereon by paying to the plaintiff the sum of $2,000.00 in full settlement of any liability thereon; that the defendant Cleve W. Van Dyke did during the year 1927 and in pursuance of said agreement, pay to the plaintiff herein the said sum of $2,000.00 and said sum was accepted

by the plaintiff herein in full settlement of any claim against the defendant Cleve W. Van Dyke upon said notes.

VI.

That on the 1st day of January, 1927, the defendant, Cleve W. Van Dyke, dictated to his stenographer at Miami, Arizona, the draft of a tentative letter addressed to Hoval A. Smith set up in plaintiff's second amended complaint herein; that at the end of said draft of said tentative letter after the words "Yours very truly" and above the typed name "Cleve W. Van Dyke," a blank space was left for the purpose of signature; that a carbon copy of said draft was handed to the plaintiff herein; that defendant Van Dyke did not sign said draft of said tentative letter, and did not dictate the typed named affixed thereto, and said letter was never completed nor ever sent to said Hoval P. Smith, but upon further con- [82] sideration of said draft of tentative letter, upon agreement by plaintiff and defendant Van Dyke the same was rejected and a telegram to said Smith was substituted therefor and sent to said Smith.

VII.

That the writing described in plaintiff's second amnded complaint dated January 1, 1927, and purporting to be a carbon copy of an instrument written by the stenographer of the defendant Van Dyke was understood by the plaintiff as a recital of the terms of an oral agreement entered into between the defendant Van Dyke and plaintiff on that date,

in which said defendant Van Dyke agreed with the plaintiff that he, Van Dyke, would pay no more money to the St. Ansgar Bank on any obligation of his (Van Dyke's) to the said St. Ansgar Bank until the said Bank took up the two notes set up in plaintiff's seconded amended complaint, then pledged to the said St. Ansgar Bank as security for money loaned to the plaintiff by said bank; that the understanding of defendant Van Dyke was the same as that of the plaintiff as expressed by the plaintiff in the following language: "Mr. Van Dyke agreed with me that he would not pay any of those notes at the St. Ansgar Bank until they took up my two notes."

VIII.

That on January 1, 1927, defendant Van Dyke agreed with plaintiff that he, Van Dyke, would pay no more notes to the St. Ansgar Bank until the St. Ansgar Bank took up the two notes set up in plaintiff's second amended complaint.

IX.

That at the time of the execution of the two notes set up in plaintiff's second amended complaint and at all times thereafter up to and including the date of the filing of this action, defendant Van Dyke was and is a resident of the State of [83] Arizona, and at no time subsequent to the 1st day of January, 1927, was he a non-resident of the state of Arizona.

X.

That both of the promissory notes set up in plaintiff's second amended complaint were lost after the commencement of this action and prior to the time of the filing of his answer therein by the defendant Cleve W. Van Dyke and same cannot be found after diligent search and inquiry, but that the evidence establishes the form and language of said notes as set forth in plaintiff's second amended complaint.

AND FROM the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the demurrer of this defendant to plaintiff's seconded amended complaint should be sustained upon the ground that the same does not state sufficient facts to constitute a cause of action under the laws of Arizona, in that it appears that the attempted causes of action therein stated are barred by the provisions of Section 2062 of the Civil Code of Arizona, 1928, and that no facts are pleaded sufficient to constitute a new cause of action under and by virtue of the provisions of Section 2068 of said Civil Code of Arizona, 1928.

II.

That the evidence introduced at the trial is insufficient to sustain the allegations of plaintiff's second amended complaint.

III.

That this action is governed by the statutes of limitation of the state of Arizona, the law of the forum in which the action is brought. [84]

IV.

That the written instrument set up in plaintiff's second amended complaint dated January 1, 1927, is to be governed in its construction by the law of the forum in which the action is brought.

V.

That both plaintiff and defendant Cleve W. Van Dyke are bound by their understanding of the instrument dated January 1, 1927, which appears in plaintiff's second amended complaint, and the construction that each of them placed upon said instrument at the time that it was dictated by the defendant Van Dyke to his stenographer.

VI.

That said instrument if properly executed would not be sufficient to enable the plaintiff herein to maintain this cause of action under the provisions of Section 2068 of the Civil Code of Arizona, 1928, in that the same neither admits the justness of the debt or subsisting liability thereon as of January 1, 1927, nor contains any promise, express or implied, upon the part of defendant Van Dyke to pay the same nor any willingness to pay the same.

VII.

That the instrument set up in plaintiff's second amended complaint, dated January 1, 1927, is not such an acknowledgment of the existence of the debt as is allowed to remove the bar of the statute on the theory that such acknowledgment or admissions carry with it an implied promise to pay, for the reason that under the construction of the Iowa statute by the Supreme Court of that state, the acknowledgment must be express, clear and direct, for it will not do to infer or imply the acknowledgment, and therefrom imply the promise to pay, thus piling implication upon implication. [85]

VIII.

That there was an accord and satisfaction of the controversy between plaintiff and defendant Van Dyke when the defendant Van Dyke paid to the plaintiff herein the sums of money amounting to $2,000.00 in the year 1927.

IX.

That the defendant Cleve W. Van Dyke is entitled to a judgment against the plaintiff herein, that said plaintiff take nothing by his said second amended complaint, and that the defendant Cleve W. Van Dyke have judgment against the plaintiff for his costs herein incurred.

CHARLES L. RAWLINS
GEORGE H. RAWLINS
THOMAS W. NEALON
Attorneys for Defendant
Cleve W. Van Dyke.

[Endorsed]: Filed Oct. 18, 1934. [86]

[Title of Court and Cause.]

MOTION TO SET ASIDE PRELIMINARY ORDER AND ENTER JUDGMENT FOR DEFENDANT CLEVE W. VAN DYKE.

COMES NOW the defendant Cleve W. Van Dyke, by his undersigned attorneys, and respectfully moves the court that the preliminary order for judgment entered in the above entitled cause and action on the 15th day of September, 1934, be set aside and annulled, and that in lieu thereof judgment be entered in favor of the defendant Cleve W. Van Dyke and as against the plaintiff herein that the plaintiff take nothing by his said second amended complaint and that the defendant, Cleve W. Van Dyke, have judgment against the plaintiff for his costs herein incurred.

CHARLES L. RAWLINS
GEORGE H. RAWLINS
THOMAS W. NEALON
Attorneys for Defendant
Cleve W. Van Dyke.

[Endorsed]: Filed Oct. 18, 1934. [87]

[Title of Court.]

November, 1934 Term At Tucson

MINUTE ENTRY OF NOVEMBER 10, 1934.
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

Plaintiff's Proposed Special Findings of Fact and Conclusions of Law, Objections of the defendant Cleve W. Van Dyke thereto, said Defendant's Motion to Set Aside Preliminary Order for Judgment and Enter Judgment for Defendant, and said Defendant's Proposed Findings of Fact and Conclusions of Law, come on regularly for hearing this day.

George R. Darnell, Esquire, and Samuel L. Pattee, Esquire, appear as counsel for the Plaintiff. Charles L. Rawlins, Esquire, appears as counsel for the Defendant Cleve W. Van Dyke, and on motion of said counsel,

IT IS ORDERED that Thomas W. Nealon, Esquire, be entered as associate counsel for said defendant.

Said Motion to Set Aside Preliminary Order for Judgment and Enter Judgment for Defendant is now duly argued by respective counsel, and

IT IS ORDERED that said Motion to Set Aside Preliminary Order for Judgment and Enter Judgment for Defendant be, and the same is hereby

denied, to which ruling and order of the Court said defendant excepts.

Counsel for the Defendant Cleve W. Van Dyke now move to be allowed to file verification to the original answer and said motion is duly argued by respective counsel. Counsel for the Plaintiff waives verification of said answer and respective counsel now stipulate that the answer herein may be treated as verified, but that Plaintiff does not admit any of the matters so verified and reserves the right to file any additional pleading made necessary by such [88] waiver of verification and stipulation, and

IT IS ORDERED that said Defendant's Motion to be allowed to file verification to original answer be, and the same is hereby denied, to which ruling and order of the Court said defendant excepts.

Said Plaintiff's Proposed Special Findings of Fact and Conclusions of Law and said Defendant's Objections thereto, and said Defendant's Proposed Findings of Fact and Conclusions of Law are now duly argued by respective counsel, and

IT IS ORDERED that said Defendant's Proposed Findings of Fact and Conclusions of Law be, and the same are hereby overruled, and that an exception be entered on behalf of said defendant as to each proposed finding, and

IT IS FURTHER ORDERED that said Defendant's Objections to Plaintiff's Proposed Special Findings of Fact and Conclusions of Law be, and the same are hereby overruled, and that an exception be entered on behalf of said defendant, and

IT IS FURTHER ORDERED that said Plaintiff's Proposed Special Findings of Fact and Conclusions of Law be, and the same are hereby allowed subject to the following exceptions and amendments thereto, and that an exception be entered on behalf of said Defendant as to each of said Special Findings and Conclusions:

That the words "and expressed a willingness to pay the same" in special finding No. 5 be stricken;

That the words "Executed at Miami, Arizona" be inserted in line four of special finding No. 5, following the word "instrument" in said line four;

That the following conclusions be added: "That the instrument in writing executed at Miami, Arizona, on the 1st day of January, 1927, is a sufficient acknowledgment under Section 2068, Revised Statutes of Arizona, 1928, to take the cause of action on said notes out of the Arizona Statute of Limitations"; and "That the memorandum in writing executed at Miami, Arizona, on the 1st day of January, 1927, is a sufficient admission in writing signed by the party to be charged that the debt is unpaid, under Section 11018, Code of Iowa, 1927, to revive the cause of action on said notes." [89]

Upon stipulation of the respective counsel,

IT IS ORDERED that the Plaintiff be allowed until November 17, 1934, within which to prepare, serve and file Findings of Fact, Conclusions of Law and Judgment in accordance with said rulings. [90]

[Title of Court and Cause.]

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on for trial before the above named Court sitting without a jury, a jury trial having been duly waived, by the parties hereto, and was tried on the 2nd and 3rd days of June, 1933, the parties being present in person and by their counsel. The demurrer of the defendant Hoval A. Smith to the second amended complaint having been sustained and the action dismissed as against him, the cause proceeded as against the defendant Cleve W. Van Dyke, and the Court having considered the evidence both oral and documentary offered in behalf of the respective parties and having considered the arguments of counsel submitted in writing, makes the following Special Findings of Fact and Conclusions of Law respecting the first cause of action set forth in the second amended complaint:

1. That the plaintiff is and was at the time of the commencement of this action a citizen and resident of the State of Michigan and that the defendant Cleve W. Van Dyke is and was at the time of the commencement of this action a citizen of the State of Arizona.

2. That the sum or value of the matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

3. That on the 30th day of October, 1917, the defendants Cleve W. Van Dyke and Hoval A. Smith, made, executed and delivered [91] to the plaintiff their certain promissory note in writing, which note is in the words and figures following:

$5,000.00 Chicago, Illinois,
October 30, 1917.

On or before December 30, 1918, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker, at The St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.

It is agreed, and consent is hereby given, that if sued, a reasonable attorneys' fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

(Sgd) HOVAL A. SMITH,
CLEVE W. VAN DYKE.

No. 23716
P. O. Miami, Ariz. and Chicago.

Endorsed: April 14th, 1927, paid hereon
by check, $500.00
June 13th, 1927, paid hereon by check, $500.00

Said note was casually signed and dated at Chicago, Illinois, but was payable at the bank therein named in the State of Iowa.

4. That said note was given for a valuable consideration and at the time of the commencement of this action the plaintiff was and still is the owner and holder thereof, and that no part thereof has been paid except the sum of One Thousand Dollars ($1,000.00) paid in two installments of Five Hundred Dollars ($500.00) each at the dates set forth in the endorsements thereon.

5. That after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note in a written instrument in the following words and figures:

January 1, 1927.

Mr. Hoval A. Smith
care Senator Ralph H. Cameron,
Senate Office Building
Washington, D. C. [92]

My dear Hoval:

Mr. Bascom Parker, of Niles, Michigan, arrived in Miami a few days ago asking the settlement of two notes of $5,000 each, given to him Chicago, August 30, 1917, in payment for his stock in the Calhoun Timber Company. You will recall this deal.

This stock was purchased for the remaining stockholders of the company at the request of Mr. H. C. Olcott, acting for the trustees of the

bondholders of the Calhoun Timber Company. The amount to be paid for this stock was $50,000; $25,000 of which was to be in Calhoun Timber Company bonds which were owned by the Calhoun Timber Company and $10,000 in cash, and $15,000 in three $5,000 notes. These notes were to be the joint obligation of yourself, Mr. Lubiens and myself. The cash paid to Mr. Parker was a check against the $100,000 fund in the St. Ansgar Bank which we had borrowed from Thomas F. Cole, of New York. These notes were to have been paid when due. One of them came due in the following June and was sent out to me to Miami for collection. I paid this note. The two other notes have never been paid and form the basis of a demand on the part of Mr. Parker for payment at this time.

The stock was delivered and was transferred on the books of the company. One third of the stock was delivered to yourself, one third to R. C. Lubiens, and one-third to myself. After the company became defunct the $100,000 owed to Thomas F. Cole became due and as you know I have paid this sum, so that puts me now in the position of having paid $15,000 or the $25,000 that was owing to Mr. Parker. After the first note was paid the other two notes were taken over by the St. Ansgar Bank, through Lubiens. Later on one of them was sent to me for collection by the St. Ansgar Bank. I refused to pay the same at the time because I had already paid the share due from me and later I paid a fur-

ther sum of $10,000 which was the original cash paid to Mr. Parker.

The notes were returned to the St. Ansgar Bank from the Gila Valley Bank of Miami, the bank to whom they were sent for collection. The refusal was based upon the grounds that I did not owe the money, that the stock had been turned over to Mr. Lubiens and that he owed the money for the amount due, as I had paid my share in full.

Later on there were some differences between the St. Ansgar Bank on this Calhoun Timber Company matter and yourself and myself. Mr. Lubiens, who was the treasurer of the company, and who was mutually trusted by us at the time, had gathered together a lot of notes which he had placed in the bank and which had been signed by us at various times, and for which we had received no consideration and for which the Calhoun Timber Company had received no consideration. In my opinion at the time this matter was brought to my attention by you and Mr. Salisbury, the whole matter was a fraud and that the bank could not hold me for any amount.

Time went on and at your insistence an agreement was reached between ourselves and the St. Ansgar Bank. In order to avoid litigation we agreed to a settlement between the bank and ourselves with the understanding that all notes and obligations were to be included with-

in this settlement. No notice has ever been received by me from the Bank of St. Ansgar or Mr. Lubiens [93] that they had not taken up these notes when they were refused payment by me for the cause stated above. I was under the impression that Mr. Lubiens and bank, having been notified by me that it was their obigation, had assumed these notes and that they were still held by them and was part of the consideration upon which our settlement was based. What was my surprise to learn the other day upon the arrival of Mr. Parker that the bank, instead of including these notes in our settlement as I presumed was being done, had returned the notes to Mr. Parker unpaid. And now Mr. Parker has presented these notes to me for payment.

Now, Hoval, I have tried to be patient in this matter, I have tried to be fair; I have assumed more than my share of the obligation of this disastrous enterprise. I have carried the loan for you; I have carried the loan for the bank and had paid out practically all the cash money which has been paid out since the final crash of the company. I have secured not one nickel or one dime in salvage from the company and I have gone so far as to pay the $100,000 to Mr. Cole which was a joint obligation of yourself, the bank and myself.

I presumed the bank was trying to adjust this thing fairly and on a basis of equity and trying to clear up a nasty mess. When Mr.

Parker arrived I explained to him fully what my relationship to the bank was on these matters. I told him that we now have due and payable a note to them of $10,000. He has notified me that we must not make this payment to the bank until his matter is adjusted.

I am writing you to inform you of the situation. I request now that you feel obligation to Mr. Parker to fulfill my statement to him that we will not pay this note to the Bank of St. Ansgar until the matter is adjusted. In other words I request that you, upon your return to Arizona, stop at St. Ansgar, see Mr. Salisbury and present this matter to him. Mr. Parker would have levied upon this payment that we were about to make to the bank of St. Ansgar had I not stipulated to him as stated above. I suggest that you now have a definite understanding with Mr. Salisbury in reference to this matter. I expect them to treat Mr. Parker as fairly as I have treated them. Our agreement with Mr. Parker was definite. Our arrangement among ourselves was well understood and Mr. Parker is only asking for his rights and what is legitimate. The fact of the matter is I am very much surprise indeed at the action taken by the bank in this matter, especially after the settlement that has been made between them and us. We were trying to seek a way out of our difficulties and the way out unloaded over a quarter of a million dollars of obligations upon myself, which, while

it is unfair, was arranged in order to avoid troublesome litigation and a long period of contest and fighting. As you know, we discussed the matter and we decided that it would take a large sum of money and a long time to work out this litigation. My health was poor, your affairs were involved, times were hard and we felt that we might better make an amicable settlement rather than seek our dues in the court. It may be that Mr. Salisbury does not know about this situation, and if he does not, you should apprise him of it and clarify it as soon as possible.

With kindest personal regards, I am

Your very truly,

CLEVE W. VAN DYKE.

[94]

That the promissory note set forth in Finding 3 is one of the promissory notes mentioned and described in the foregoing instrument. Said instrument was written, signed and delivered by defendant, Cleve W. Van Dyke, to the plaintiff at Miami, in the County of Gila, State of Arizona, on the first day of January, 1927.

6. That immediately prior to the first day of January, 1927, the date upon which said instrument was written, the plaintiff presented said promissory note to the defendant Cleve W. Van Dyke and demanded payment thereof. That on said first day of January, 1927, the defendant Cleve W. Van Dyke in the presence of the plaintiff dictated to

his secretary the instrument bearing date on that day and the same was taken down in shorthand and on said day written out in typewriting and the name of the defendant Cleve W. Van Dyke was written at the end thereof in typewriting. As soon as the same had been written out in typewriting a carbon copy thereof was delivered by the said defendant Cleve W. Van Dyke to the plaintiff. That the said defendant Van Dyke informed the plaintiff that he intended to send the original or ribbon copy of said instrument to the defendant Hoval A. Smith, but in fact never did send it but retained it in his possession. That the said defendant Cleve W. Van Dyke intended to adopt and did adopt his name written in typewriting at the foot of said instrument as his signature, and did thereby sign the same.

7. Thereafter and on the 14th day of April, 1927, the defendant Cleve W. Van Dyke paid the plaintiff upon the said note the sum of $500.00, and on June 13th, 1927, paid the plaintiff on said note the further sum of $500.00, making $1,000.00 in all. That such payments were intended and agreed to be, and in fact were payments upon the promissory note aforesaid and not a sum agreed upon in settlement of any [95] liability on said note.

8. That between the first day of January, 1927, and the time of the commencement of this action the defendant Cleve W. Van Dyke was absent from the State of Arizona and in the State of California for different periods aggregating more than six months.

9. With respect to the second cause of action set forth in the complaint, Findings 1 and 2 relating to the First Cause of Action are adopted without here repeating them.

10. That on the 30th day of October, 1917, the defendants, Cleve W. Van Dyke and Hoval A. Smith made, executed and delivered to the plaintiff their certain promissory note in writing, which note is in the words and figures following:

> $5,000.00 Chicago, Illinois, Oct. 30, 1917
>
> On or before June 30, 1919, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker at The St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.
>
> It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.
>
> The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.
>
> (Sgn) HOVAL A. SMITH
> CLEVE W. VAN DYKE
>
> No. 5793
> P. O. Bisbee, Ariz.
> Miami, Arizona
>
> Endorsed: May 21st, 1927, paid hereon
> by check $500.00
> July 20th, 1927, by check, 500.00

Said note was casually signed and dated at Chicago, Illinois, but was payable at the bank therein named in the State of Iowa.

11. That said note was given for a valuable consideration and at the time of the commencement of this action the plaintiff was and still is the owner and holder thereof, and that no part thereof has been paid except the sum of One Thousand Dollars ($1,000.00) paid in two installments of Five Hundred Dollars [96] ($500.00) each at the dates set forth in the endorsements thereon.

12. That after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note in the written instrument which is set forth in Finding No. 5 upon the First Cause of Action and is one of the promissory notes mentioned and described in said written instrument. Said instrument was written, signed and delivered by defendant Cleve W. Van Dyke to the plaintiff at Miami, in the County of Gila, State of Arizona, on the first day of January, 1927.

13. That immediately prior to the first day of January, 1927, the date upon which said instrument was written, the plaintiff presented said promissory note to the defendant Cleve W. Van Dyke and demanded payment thereof. That on said first day of January, 1927, the defendant Cleve W. Van Dyke in the presence of the plaintiff dictated to his secretary the instrument bearing date on that day and the same was taken down in shorthand and

on said day written out in typewriting and the name of the defendant Cleve W. Van Dyke was written at the end thereof in typewriting. As soon as the same had been written out in typewriting a carbon copy thereof was delivered by the said defendant Cleve W. Van Dyke to the plaintiff. That the said defendant Van Dyke informed the plaintiff that he intended to send the original or ribbon copy of said instrument to the defendant Hoval A. Smith, but in fact never did send it but retained it in his possession. That the said defendant Cleve W. Van Dyke intended to adopt and did adopt his name written in typewriting at the foot of said instrument as his signature, and did thereby sign the same.

14. Thereafter and on the 14th day of April, 1927, the defendant Cleve W. Van Dyke paid the plaintiff upon said note the sum of $500.00, and on June 13th, 1927, paid the plaintiff [97] on said note the further sum of $500.00, making $1,000.00 in all. That such payments were intended and agreed to be and in fact were payments upon the promissory note aforesaid and not a sum agreed upon in settlement of any liability on said note.

15. That between the first day of January, 1927, and the time of the commencement of this action the defendant Cleve W. Van Dyke was absent from the State of Arizona and in the State of California for different periods aggregating more than six months.

16. That both of said promissory notes were lost since the commencement of this action and the same

can not be found after diligent search and inquiry, but that the evidence establishes the form and language of said notes as set forth in the foregoing findings.

17. The Court further finds that a reasonable attorneys' fee for the bringing of this action upon both of said notes and prosecuting the same to judgment on behalf of the plaintiffs is the sum of Two Thousand Dollars ($2,000.00).

As Conclusions of Law the Court Finds:

1. That the promissory notes set forth in the first and second cause of action are not, nor is either of them, barred by the statute of limitations of the State of Iowa or the State of Arizona, but that the same are now valid and subsisting obligations.

2. That the instrument dated January 1st, 1927, written and signed by the defendant Cleve W. Van Dyke is a sufficient memorandum in writing signed by the said defendants to arrest the running of the statute of limitations and to start the period of limitation to running anew under the law of the State of Iowa.

3. That the instrument dated January 1st, 1927, written and signed by the defendant Cleve W. Van Dyke is a sufficient [98] memorandum in writing signed by the said defendants to arrest the running of the statute of limitations and to start the period of limitation to running anew under the law of the State of Arizona.

4. That the absences of the defendant Cleve W. Van Dyke from the State of Arizona prevented the

operation of the statute of limitations during the period of such absences, and that neither of said notes was barred by limitations.

5. That the plaintiff is entitled to judgment against the defendant Cleve W. Van Dyke for the sum of Eight Thousand Dollars ($8,000.00), being the unpaid principal of said two promissory notes, with interest at the rate of seven per cent (7%) per annum from the maturity thereof as therein provided until paid, less the sum of One Thousand Dollars ($1,000.00) paid upon each of said notes, and for a reasonable attorneys' fee in the amount fixed by the Court at the sum of Two Thousand Dollars ($2000.00), and for the costs of this action.

Let judgment be entered accordingly.

Dated November 22nd, 1934.

ALBERT M. SAMES
Judge of the District Court of the United States for the District of Arizona.

[Endorsed]: Plaintiff's Proposed Special Findings of Fact and Conclusions of Law. Filed Nov 16 1934.

[Endorsed]: Special Findings of Fact and Conclusions of Law. Filed Nov 22 1934. [99]

In the District Court of the United States for the District of Arizona

No. L-202—Globe

BASCOM PARKER,

Plaintiff,

vs.

HOVAL A. SMITH and CLEVE W. VAN DYKE,

Defendants.

JUDGMENT

This cause came on for trial before the above named Court, sitting without a jury, a jury trial having been duly waived by stipulation of the parties hereto, and was tried on the 2nd and 3rd days of June, 1933, the parties being present in person and by their counsel.

The demurrer of the defendant Hoval A. Smith to the second amended complaint having been sustained and no further amendment having been filed, and the action having been ordered dismissed as against him, the cause proceeded as against the defendant Cleve W. Van Dyke. Both parties offered oral and documentary evidence, and the Court having considered the evidence and the arguments of counsel submitted in writing, did thereafter enter its order directing judgment to be entered in favor of the plaintiff and did thereafter make and file its special findings of fact and conclusions of law

respecting each of the causes of action set forth in said second amended complaint, and did direct that judgment be entered in favor of the plaintiff as previously ordered.

NOW, THEREFORE, pursuant to said order for judgment and said special findings of fact and conclusions of law and the direction respecting the entry of judgment made pursuant thereto, it is by the Court, [100]

ORDERED, ADJUDGED AND DECREED that the plaintiff Bascom Parker do have and recover of and from the defendant Cleve W. Van Dyke upon the first and second causes of action set forth in the second amended complaint herein the principal sum of Eight Thousand Dollars ($8,000.00), together with interest in accordance with the terms of the promissory notes set forth in plaintiff's second amended complaint herein, amounting in all, both principal and interest at the date of this judgment to the sum of Eighteen Thousand Seven Hundred Sixty-seven and 68/100 Dollars ($18,767.68), and that said principal sum of Eight Thousand Dollars ($8,000.00) bear interest from the date hereof until paid at the rate of seven per cent per annum.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Bascom Parker do have and recover of and from the defendant Cleve W. Van Dyke the further sum of Two Thousand Dollars ($2,000.00) attorneys' fees in this action.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said plaintiff Bascom Parker do have and recover of and from the defendant Cleve W. Van Dyke the costs of this action taxed at the sum of One Hundred Seventy Nine and 55/100 Dollars ($179.55).

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that for the several sums adjudged in favor of the said plaintiff he have execution against the defendant Cleve W. Van Dyke.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be dismissed as against the defendant Hoval A. Smith and that said defendant Hoval A. Smith go hence without day.

Done in Open Court this 22nd day of November, 1934.

ALBERT M. SAMES
Judge U. S. District Court.

[Endorsed]: Pltf's. Proposed Judgment. Filed Nov 16 1934.

[Endorsed]: Filed Nov 22 1934. [101]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

COMES NOW Cleve W. Van Dyke, defendant in the above entitled cause and moves this Court for an order setting aside the judgment herein as

to this defendant and granting a new trial in the above entitled cause as to this defendant, for the following reasons:

I.

That the judgment rendered in the above entitled cause and action is contrary to law in that plaintiff's second amended complaint fails to state a cause of action that is not barred by the statute of limitations of the State of Arizona, as contained in Subdivision 3, Section 2061, of 1928 Civil Code of Arizona, and for this reason the demurrer of this defendant setting up Sec. 2068 of the Civil Code of Arizona as a defense should have been sustained.

II.

That the judgment of the Court rendered in favor of plaintiff herein is not justified by the Findings of Fact made by the Court, and is contrary to law, in that Findings of Fact, numbered 5 and 12, stating that the written instrument dated January 1, 1927, and which is set up in haec verba in said Finding of Fact numbered 5, "was written, signed and delivered at Miami, in the County of Gila, State of Arizona, on the first [102] day of January, 1927", is not sufficient to take the claim sued upon out of the operation of the statute of limitations of the State of Arizona under Section 2068, Civil Code, 1928.

III.

That the judgment of the Court is erroneous and a new trial should be granted herein for the rea-

son that the Court's Conclusion of Law numbered 1 that the promissory notes set forth in the first and second causes of action are not, nor is either of them, barred by the statute of limitations of the state of Iowa or the state of Arizona, but that the same are now valid and subsisting obligations, is erroneous, in that the action is governed by the law of the forum, namely, of the state of Arizona, and Findings of Fact numbered 5 and 12 showing that the instrument dated January 1, 1927, was delivered at Miami, County of Gila, State of Arizona, required the conclusion of law that the action is barred by the statutes of limitation of the State of Arizona.

IV.

That Conclusion of Law numbered 2 is erroneous in holding that the instrument dated January 1, 1927, is a sufficient memorandum in writing, signed by said defendant, to arrest the running of the statute of limitations and to start the period of limitations to running anew under the law of the state of Iowa, in that said instrument was dictated and delivered in the state of Iowa, and is required to be interpreted under the laws of the State of Arizona, and is not sufficient under the laws of the state or Arizona to arrest the running of the statute of limitations and to start the period of limitations to running anew under he laws of the state of Iowa, and for the further reason that the laws of Arizona being the law of the forum govern in all matters pertaining to the remedy. [103]

V.

That Conclusion of Law numbered 3 that the instrument dated January 1, 1927, is a sufficient memorandum in writing signed by said defendant to arrest the running of the statute of limitations to running anew under the laws of the state of Arizona, is erroneous in that said instrument is not sufficient under the provisions of Section 2068, Revised Code of Arizona 1928 to start the period of limitations to running anew under the laws of the state of Arizona or to arrest the running of the statute of limitations of the state of Arizona, in that the same does not contain any express or implied promise to pay the debt upon which recovery is sought in this action, nor does it contain an acknowledgment of the justness of the claim as a subsisting obligation as of the date of January 1, 1927, or at all, from which the promise to pay the same could be implied, but expressly negatives any such acknowledgment.

VI.

That Conclusions of Law numbered 5 is erroneous in that the Findings of Fact are not sufficient to sustain the entry of the judgment in that it appears from said Findings of Fact that the action is barred by the statute of limitations of the state of Arizona as pleaded by this defendant.

VII.

That the Court erred in making its Findings of Fact numbered 4 and 11 that the plaintiff was

and still is the holder of the notes set up in Findings of Fact numbered 3 and 10 in haec verba, in that there is no evidence in the record to sustain said Findings of Fact that plaintiff was and still is the owner and holder of said notes at the time of the filing of this action or at the time of the judgment. That said notes were not produced at the trial and for that reason no inference could be drawn therefrom that they were still owned by the [104] plaintiff in this action, and the uncontradicted evidence is (R T 22) that these notes had been pledged to the St. Ansgar Bank of Brush, Lubiens & Annis, and the only testimony tending to establish these notes as lost instruments were the depositions of Robert E. Proctor, Carson P. Parker, Annie E. Parker, Mary E. Renier and Chloe Dinehart, and it nowhere appears in these depositions that the witnesses making same had ever seen the original pleadings filed in this action, or a certified copy thereof or any authenticated copy thereof; that therefore there was no sufficient identification of these notes to either permit secondary evidence thereof being introduced into evidence or from which any inference of ownership in the plaintiff could be implied.

VIII.

That that part of Findings of Fact numbered 5 and 12 reading as follows: "said instrument was written, signed and delivered by defendant Cleve W. Van Dyke to the plaintiff at Miami, in the

County of Gila, State of Arizona, on the first day of January, 1927", is not sustained by any evidence and is contrary to the evidence, in that it appears upon the face of said written instrument (plaintiff's Exhibit No. 4) that the same was merely a carbon copy of a tentative letter which was never signed or delivered and that it was an uncompleted instrument with a blank space left for the signature of the defendant Cleve W. Van Dyke, should the same meet with his approval; that there is no evidence in the record to show that the defendant Cleve W. Van Dyke adopted or intended to adopt the typewritten words "Cleve W. Van Dyke" at the foot of said letter, as his signature.

IX.

That the judgment rendered by the Court herein is contrary to the evidence in that the uncontradicted evidence [105] shows that the instrument dated January 1, 1927, and which is set up in haec verba in Finding of Fact numbered 5, was construed at the time at which it was dictated, by the plaintiff and defendant Cleve W. Van Dyke as not being an acknowledgment of the justness of the claim herein sued upon nor any recognition thereof as a subsisting obligation of the defendant Cleve W. Van Dyke, nor was it intended as an admission of the justness of the debt sued upon or of any willingness to pay the same, nor any express or implied promise of any willingness to pay the same; that upon the contrary it was inter-

preted by the plaintiff and defendant Cleve W. Van Dyke at that time to be a promise upon the part of defendant Van Dyke that he would not pay to the St. Ansgar Bank certain notes due that bank in the sum of $10,000.00 by the defendant Van Dyke, until that bank should settle with the plaintiff in this action for the notes which are now the subject matter of this action, and that was the interpretation placed upon said instrument by each of the parties at the time of the trial, the interpretation of the plaintiff as given in his testimony (R. T. 67) being in words as follows: "Mr. Van Dyke agreed with me he would not pay any of those notes at the St. Ansgar Bank until they took up my two notes."

X.

That Finding of Fact numbered 6 is erroneous and not sustained by the evidence as to that portion thereof reading as follows: "That the said defendant Cleve W. Van Dyke intended to adopt and did adopt his name written in typewriting at the foot of said instrument as his signature, and did thereby sign the same;" that therefore the judgment being founded upon a finding of fact that has no evidence to support it, is erroneous and contrary to the law and the evidence.

XI.

That Findings of Fact numbered 8 and 15, to the effect [106] that Cleve W. Van Dyke was absent from the State of Arizona in the state of California

at different periods aggregating more than six months is not sustained by the evidence, there being no evidence to show that said Van Dyke was absent from the state for any such period of time.

XII.

That that portion of Finding of Fact numbered 13 reading as follows: "that said defendant Cleve W. Van Dyke intended to adopt and did adopt his name written in typewriting at the foot of said instrument and did thereby sign the same" is not sustained by any evidence, and therefore the judgment of the court is not sustained by the evidence.

XIII.

That Finding of Fact numbered 16 is not sustained by the evidence as it does not appear from any of the depositions introduced into evidence that any of the witnesses making said depositions ever saw the promissory notes signed by this defendant or any original pleading in the case or any certified or authenticated copy thereof, or that the notes seen by them were notes that had been signed by this defendant.

XIV.

That the judgment of the Court rendered herein is erroneous as a matter of law, in that the original complaint filed in this action was based upon a foreign contract, namely, an Iowa contract, and the same being barred by the Arizona statute of limitations, Section 2061, the court rightly sustained

a demurrer thereto; that the second amended complaint filed by the plaintiff herein was based upon the same theory, namely, that this was an action upon an Iowa contract and not upon any new promise and was so construed by the plaintiff in the allegations of his pleadings of matters to avoid the statute of limitation of the state of Iowa; and because the [107] cause of action upon the original notes could not be maintained when the defendant pleaded the bar of the statute of limitations of the state of Arizona, this judgment is erroneous and a new trial should be granted this defendant Cleve W. Van Dyke.

WHEREFORE this defendant, Cleve W. Van Dyke, prays that his motion to set aside the judgment herein as to him and grant a new trial as to him, be granted.

CHARLES L. RAWLINS
GEORGE H. RAWLINS
THOMAS W. NEALON
Attorneys for Defendant
Cleve W. Van Dyke

[Endorsed]: Filed Nov 30 1934. [108]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE OF MOTION FOR NEW TRIAL AND POINTS AND AUTHORITIES OF DEFENDANT CLEVE W. VAN DYKE ON MOTION FOR NEW TRIAL.

State of Arizona,
County of Maricopa.—ss.

JOSEPHINE PRUETT, being first duly sworn, deposes and says:

That on the 28th day of November, 1934, she deposited in the United States Post Office, at the branch thereof known as the Luhrs Station, on West Jefferson Street, Phoenix, Arizona, a sealed envelope, postage prepaid, containing a copy of the Motion for New Trial and a copy of Points and Authorities of Defendant Cleve W. Van Dyke on Motion for New Trial, in the above entitled cause, which envelope was addressed to Messrs. Darnell & Nave, Attorneys for Plaintiff, at their office in the Consolidated National Bank Building, Tucson, Arizona, and their letter acknowledging receipt thereof is attached hereto.

JOSEPHINE PRUETT

Subscribed and sworn to before me this 2nd day of January, A. D., 1935.

My commission expires January 23, 1936.

[Seal] MARGARET WATSON
Notary Public. [109]

Law Offices of
DARNELL & NAVE
Consolidated Nat'l Bank Bldg.,
Tucson, Arizona.

November 30th, 1934.

Rawlins & Rawlins, Attorneys
Professional Building
Phoenix, Arizona.

Gentlemen:

Attention: Mr. Charles L. Rawlins

We acknowledge receipt of your motion for new trial and the memorandum of points and authorities in support thereof.

We do not know what date Judge Sames will wish to take this matter up, but will ascertain that and write you.

Very truly yours,
DARNELL & NAVE
By: George R. Darnell

GRD:G

[Endorsed]: Filed Jan 3 1935. [110]

RAWLINS & RAWLINS
Attorneys and Counsellors at Law
Professional Building
Phoenix, Arizona.

Charles L. Rawlins
Geo. H. Rawlins

December 8, 1934.

Messrs. Darnell & Nave,
Attorneys at Law,
Consolidated National Bank Bldg.,
Tucson, Arizona.

Re: Parker vs. Van Dyke

Gentlemen:

It is agreeable to me to have the Motion for New Trial which is set for Monday, December 10th, continued until December 20th. I cannot accept the 31st as I have that day engaged and also the 7th of January. Judge Nealon is likewise tied up on those dates. When I talked to you on the telephone, I didn't just exactly know the facts.

Now you can have this motion set down for the 20th and if that is not satisfactory to you, it can go down to a further date in January. Any time after the 10th of January will be satisfactory to us.

You may have all the time you want to file objections, motions, briefs, or other pleadings to our Motion for New Trial, and the rules need not be followed as far as we are concerned in this matter.

Very truly yours,
Chas. L. Rawlins
CHARLES L. RAWLINS

CLR:JO
Enc.

[Endorsed]: Filed Dec 10 1934. [111]

[Title of Court.]

November 1934 Term At Tucson

MINUTE ENTRY OF DECEMBER 8, 1934
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

On motion of George R. Darnell, Esquire, counsel for the Plaintiff, and upon his representation to the Court that counsel for the Defendant Cleve W. Van Dyke have agreed thereto,

IT IS ORDERED that said Defendant's Motion for New Trial, heretofore filed herein, be continued for hearing at Tucson to Thursday, December 20, 1934 at the hour of ten o'clock A. M., and that said Plaintiff be allowed until December 18, 1934, within which to file his brief in opposition to said Motion. [112]

[Title of Court.]

November 1934 Term At Tucson

MINUTE ENTRY OF DECEMBER 20, 1934
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

HEARING ON MOTION FOR NEW TRIAL.

Motion of the Defendant Cleve W. Van Dyke for New Trial comes on regularly for hearing this day.

George R. Darnell, Esquire, and Samuel L. Pattee, Esquire, appear as counsel for the Plaintiff. Thomas J. Nealon, Esquire, appears as counsel for the Defendant.

Argument is now had by respective counsel, and

IT IS ORDERED that said Motion for New Trial be submitted and by the Court taken under advisement; that the Plaintiff be allowed fifteen days within which to file his authorities and that said Defendant be allowed fifteen days thereafter within which to reply thereto. **[113]**

[Title of Court.]

November 1934 Term At Tucson

MINUTE ENTRY OF FEBRUARY 12, 1935
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

ORDER DENYING MOTION FOR NEW TRIAL.

Motion of the Defendant Cleve W. Van Dyke for a New Trial having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that said Motion for New Trial be, and the same is hereby denied, and that an exception be entered on behalf of said Defendant. [114]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO FILE AND SETTLE BILL OF EXCEPTIONS AND DOCKET APPEAL

IT IS STIPULATED by and between the parties to the above entitled and numbered action,

through their undersigned attorneys, that an order may be entered by the Court extending the time of the defendant, Cleve W. Van Dyke, within which to prepare draft of Bill of Exceptions, serve and file same, and have same settled, allowed and approved, up to and including the 1st day of May, 1935.

IT IS FURTHER STIPULATED that the time for docketing the appeal in the above entitled and numbered cause may be by order of the Court extended to and including the 1st day of May, 1935.

DARNELL & NAVE
SAMUEL L. PATTEE
Attorneys for Plaintiffs
RAWLINS & RAWLINS
CHARLES L. RAWLINS
THOMAS W. NEALON
Attorneys for Defendant,
Cleve W. Van Dyke

[Endorsed]: Filed Feb 25 1935. [115]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR PREPARATION AND FILING, ETC., OF BILL OF EXCEPTIONS

IT IS HEREBY ORDERED that the time within which Cleve W. Van Dyke may prepare draft

of Bill of Exceptions, serve and file same and obtain settlement, allowance or approval thereof, be and the same is hereby extended to and including the 1st day of May, 1935.

Done in open Court this 25th day of February, 1935.

ALBERT M. SAMES
United States District Judge

[Endorsed]: Filed Feb 25 1935. [116]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME FOR PRESENTATION, SETTLEMENT, AND ALLOWANCE OR APPROVAL OF BILL OF EXCEPTIONS, FOR DOCKETING APPEAL, AND EXTENDING NOVEMBER 1934 TERM OF THE COURT

IT IS STIPULATED by and between Bascom Parker, plaintiff and appellee, and Cleve W. Van Dyke, defendant and appellant, acting by their undersigned attorneys, that an order may be entered in the above entitled matter, extending the time for presentation, settlement, and allowance or approval of the bill of exceptions, for docketing the appeal, and extending the November 1934 Term

of the Court, up to and including the 1st day of June, 1935.

Dated this 22nd day of April, 1935.

GEORGE R. DARNELL
SAMUEL L. PATTEE
L. V. ROBERTSON
Attorneys for Plaintiff and Appellee
CHARLES L. RAWLINS
GEO. H. RAWLINS
THOMAS W. NEALON
Attorneys for Defendant Cleve W. Van Dyke, defendant and appellant

[Endorsed]: Filed Apr 22 1935. [117]

[Title of Court and Cause.]

ORDER EXTENDING NOVEMBER 1934 TERM OF FEDERAL COURT.

IT IS HEREBY ORDERED that the November 1934 term of this District Court for the District of Arizona, be and the same is hereby extended to and including the 1st day of June, 1935, for the purpose of preparing and filing, settlement, allowance or approval of bill of exceptions, and for the purpose of making any and all motions, and of taking any action which must be made or taken within the November 1934 term of the Court,

in reference to the judgment in the above entitled action.

Done in open Court this 22nd day of April, 1935.

ALBERT M. SAMES
Judge of United States
District Court

[Endorsed]: Filed Apr 22 1935. [118]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR PRESENTATION, SETTLEMENT AND ALLOWANCE OR APPROVAL OF BILL OF EXCEPTIONS.

IT IS HEREBY ORDERED that the time within which the defendant Cleve W. Van Dyke may obtain settlement, and allowance or approval of the bill of exceptions in the above entitled cause, be and the same is hereby extended to and including the 1st day of June, 1935.

Done in open Court this 22nd day of April, 1935.

ALBERT M. SAMES
Judge of United States
District Court

[Endorsed]: Filed Apr 22 1935. [119]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

BE IT REMEMBERED, that heretofore, towit on the 2nd day of June, 1933, the above entitled cause came on for trial at Tucson, in said District, upon the issues joined herein, before his Honor, Albert M. Sames, sitting as a judge of said Court, without a jury, a jury having been duly waived by the parties by a written stipulation, in words and figures as follows:

> "The parties to the above entitled cause hereby waive trial by jury herein and submit the same for hearing and decision by the Honorable Albert M. Sames, Judge in said cause."

The plaintiff being present in person and represented by his attorneys, Messrs. Kingan, Darnell & Nave, Hon. George R. Darnell and Hon. S. L. Pattee; and the defendant, Cleve W. Van Dyke, being present in person and represented by his attorneys, Messrs. Rawlins & Rawlins, Charles L. Rawlins, Esq., George H. Rawlins, Esq., and William H. Brooks, Esq.; and the defendant Hoval A. Smith being present in person but not participating in the trial by reason of the fact that a demurrer in his behalf had been previously sustained as to plaintiff's complaint.

WHEREUPON the parties respectively offered and introduced the following evidence and exhibits of evidence, and the following objections and motions were made and rulings of the court were en-

tered and exceptions taken by the parties, all as follows, towit:— [120]

TESTIMONY OF CLEVE W. VAN DYKE

Defendant, Cleve W. Van Dyke, was called as a witness for the plaintiff, under the provisions of the Arizona statute as an adverse party on cross-examination.

Direct Examination

My name is Cleve W. Van Dyke. I am one of the defendants in this action. I live at Miami, Arizona. I have not lived at Long Beach recently; I have been in Long Beach when I have been ill, but my home is in Miami. I built a temporary place in Long Beach. No I did not build a home there where I resided with my family; I built an automobile bungalow there, a place where I could drive into. I put in a sprinkling system. I did not have that as my home, I was there temporarily only. It is difficult for me to answer how much of the time I spent in Long Beach, California in all since January 1, 1927. I haven't a record of the days I spent there and the days I did not.

"Q. All last year, how much of the time did you spend away from the State of Arizona?"

"A. I don't know the exact number of days."

"Q. Approximately?"

"A. Oh, I presume probably one or two days, or something of that sort."

(Testimony of Cleve W. Van Dyke.)

I doubt if I was there at all in 1931; I don't recall being there in 1931. I don't think I was in Long Beach much in 1930. I might have been there in 1930, but I don't recall being there in 1930. I was in and out of Long Beach some in the spring of 1929. I really don't recall when I did go to Long Beach in the spring of 1929. I think I was in and out of Long Beach some, during the spring and summer. I would be glad to remember, if I could remember when I left Miami in 1929 [121] and went to Long Beach, but I don't remember. I did not live there at all. I was not there at all, I was in Miami most of the time—practically all of the time in 1929. It is a hard question to answer how long I was there in 1928. I built this house in Long Beach in the spring of 1927. I went there in January to build my house. I remained there in the house that spring and into the summer sometime, off and on; I was not there constantly. As I remember it, it was several weeks from January that I lived in Long Beach. It was more than a month. My impression is that I was there more than two months, but not steadily. Part of the time I was there in July of 1927. I did not make that my home in 1927. I only had one home; I live in Arizona. I built a house there and I still have that. I put a sprinkling system in my yard, and arranged the place for a place to stay when I was in Long Beach. I was absent from the state of Arizona in the spring of 1927 and again

(Testimony of Cleve W. Van Dyke.)

in the fall. It is very difficult for me to say in total time how long I was absent in the spring. I would say that I was in Long Beach for treatment, and later on that year, I went to Rochester, Minnesota to the Mayo Clinic for an operation. I think I was gone about three or four weeks in Rochester.

When I went to Long Beach in the spring of 1927, I was in and out of there during that spring. I was in and out of there from January until about August, I think; that is my memory, August or September. As to the total time during the year 1927 that I spent away from the State of Arizona, I can't answer that question, because I don't know. My best judgment as to that is that I think I was as much as three months or maybe more.

I have read the second amended complaint in this action. I have read the note set out in the second amended [122] complaint on page 2 and page 8. I have scanned the note on page 8; I haven't read the contents entirely. I looked at the notes copied on page 2, and again on page 8. I read that one. Mr. Smith and I signed this note at Chicago, Illinois, on October 30th, 1917.

> "Mr. RAWLINS (Counsel for Defendant): Now, we object to any evidence on the notes at this time, for the reason that the notes are the best evidence, the real notes, and second, that the record discloses that these were foreign notes, made without the State of Arizona,

(Testimony of Cleve W. Van Dyke.)

and payable without the State of Arizona. The record discloses that these were foreign notes, and therefore a suit upon them in this Court, the action must be commenced and prosecuted within four years from the date of the notes, as provided by Paragraph 2061, subdivision 3 of Section 2061, Civil Code of Arizona, 1928."

"The COURT: That is substantially the same question, Mr. Rawlins, that was presented on the demurrer?"

"Mr. CHARLES RAWLINS: Yes, Your Honor, that is true, but the question of proving has never been presented to Your Honor."

"Mr. RAWLINS: * * * Now, we object to the introduction of any notes at this time, because the original notes are the best evidence. They have not been offered or the signatures identified or anything, and Your Honor cannot consider that [123] this is controlled by the law of Iowa. That is not true. It is controlled by the law of the forum, and this is the forum. Supposing the law of Iowa was thirty years, could they sue after that?"

"The COURT: The court's position in this matter is this: You will remember when the demurrer first came up, it appeared upon its face that it was a suit upon this note, a foreign instrument payable in another state, and I sustained the demurrer, and then the amended complaint was filed in this court setting up

(Testimony of Cleve W. Van Dyke.)

this letter from Mr. Van Dyke to Mr. Smith, and you will remember my ruling on that. I have gone through the matter as far as I care to, and I am going to adhere to that ruling, that the effect of that letter is determined by the Iowa law and not the Arizona law. When that letter revived that, they could bring that action within four years, or within such time as the complaint alleges that he was out of the state."

"Mr. CHARLES RAWLINS: * * * They are not suing upon the new promise; they are suing upon the notes. You can't make an instrument in Arizona, and make it apply under Iowa law."

"The COURT: You can save that point. I didn't have that feature of it before me. The objection will be overruled."

"Mr. RAWLINS: We except."

* * * * * * *

"Judge DARNELL: We don't have the notes, we are going to show that the notes are lost. We are going to show that these notes are lost, and introduce secondary evidence." [124]

Mr. Hoval A. Smith and I signed those two notes set out in the second amended complaint of the plaintiff, being in the amount of Five Thousand Dollars each, both dated October 30th, 1917,

(Testimony of Cleve W. Van Dyke.)

and both payable to the plaintiff, in Chicago, signed in Chicago on October 30th, 1917. I signed these notes. There were two signatures on the notes. I signed one of the signatures and Mr. Smith's signature is on there too. There were three notes. I have not paid those that are sued on.

"Q. You paid on the note set out on page 2 of the complaint on April 14th, 1927, ten years, practically ten years after the execution of the notes, Five Hundred Dollars, didn't you?"

"The WITNESS: Well, presume I might answer that the way it occurred, Judge."

"Q. Well, I would like an answer whether he paid Five Hundred Dollars on the note or not, and then he can explain it."

"A. I paid Five Hundred Dollars, but it was on a contract of settlement of the notes."

"Q. All right. What contract was that; what contract was that you refer to?"

"A. That was one entered into between Mr. Parker and myself at Long Beach in April, 1927, concerning the settlement of those notes."

"Q. Was it in writing, the contract?"

"A. No."

The conversation between Mr. Parker and myself took place in California, partly at my home, in April, 1927. I was in Long Beach then. I believe my wife was there and was living [125] with me

(Testimony of Cleve W. Van Dyke.)

at that time. No other members of my family were there. Mrs. Van Dyke and I were there. I was there part of the time alone. I was ill at the time before she came down. I was only there when I was ill. I was there several weeks; I don't recall the exact number of days. If I remember it, I had this conversation with Mr. Parker in Long Beach, California, somewhere between the 8th of April and 15th of April; along in there, in 1927.

"Q. No, on June 13th, 1927, you also paid Five Hundred Dollars, didn't you, on this note set out on page 2 of the complaint?"

"A. I made—I made several payments, completing this arrangement in settlement of those notes with Mr. Parker. I can explain that if you want me to."

On May 21, 1927, I wrote a letter to Mr. Bascom **Parker, the plaintiff,** at Niles, Michigan, and enclosed a check for Five Hundred Dollars.

(Thereupon said document was marked "Plaintiff's Exhibit 1 for identification.")

At that time I was staying in Long Beach, California. My home was in Miami, Arizona. I was in Long Beach for illness, and my wife was with me.

"Q. You were living in the house in Long Beach that you built for you and your wife, built to live in? 'Yes' or 'No'. You were living in this house in Long Beach, California which you had built to live in, sick or well?"

(Testimony of Cleve W. Van Dyke.)

"The WITNESS: I was staying there at the time, yes sir."

"Q. Do you make any difference—do you differentiate between 'residing' and 'living' at this place?" [126]

"A. Yes, I did. My home—I can explain—my home was in Arizona and I was there temporarily receiving treatment from a physician and staying there during that period of time."

That was my position in the matter. I do not deny that I was there. I was not living and maintaining a home there. I was maintaining my home in Miami. My family was in Miami most of the time. I lived in Miami.

On June 13, 1927, I sent Mr. Bascom Parker Five Hundred Dollars more from Long Beach, California, and I wrote the letter that you hand me. I was staying in Long Beach, California, at that time. I was there temporarily. I will not say I was "living there", because I was not. That was not my permanent residence. Part of the time I was staying there in that house I built and my wife was with me part of the time.

(Thereupon the letter dated June 13, 1927, was marked for identification "Plaintiff's Exhibit 2 for identification.")

July 15th, 1927 was along towards the end of my stay in Long Beach. I wrote that letter to Mr. Parker and sent him Five Hundred Dollars. I was

(Testimony of Cleve W. Van Dyke.)

in Long Beach when I wrote it. I had been there since April; most of my time, I think; I am not positive.

Thereupon, the letter referred to was marked "Plaintiff's Exhibit 3 for identification.")

(Witness excused)

"Judge DARNELL: We will call Mr. Parker, the plaintiff. So as to be logical, we will have to split up the testimony of this plaintiff, and offer some depositions. We avow we will very fully prove as to these notes being lost."

"Judge PATTEE: We will use this plaintiff in the proof to a certain point, and then by leave of Court, withdraw him." [127]

TESTIMONY OF BASCOM PARKER

Plaintiff, Bascom Parker, being called as a witness in his own behalf, and having been duly sworn testified as follows:

Direct Examination

My name is Bascom Parker. I am a resident of Niles, Michigan, and am the plaintiff in this case. I know Hoval A. Smith and Cleve W. Van Dyke, the defendants, very well. In the City of Chicago, Illinois, on October 30, 1917, there were executed and delivered to me the notes set out on pages 2

(Testimony of Bascom Parker.)

and 8 of the second amended complaint. They were delivered to me on that date by the defendant Cleve W. Van Dyke.

"Q. Now, what did you do with those notes, if anything, as to the custody and possession of them? The whereabouts of the notes?"

"Mr. CHARLES RAWLINS: Now, if the Court please, I don't know whether they are going to produce copies of those notes, and if they don't, this does not meet the requirements. We object to it."

"Judge DARNELL: On what ground?"

"Mr. CHARLES RAWLINS: On the ground that the notes are barred by the statute of limitations of the State of Arizona for the reason that more than four years has accrued after the maturity of the notes before the bringing of this action."

"The COURT: That objection runs all the way through the case."

"Mr. CHARLES RAWLINS: Note our exception to all of this procedure."

"The COURT: Yes." [128]

"Mr. CHARLES RAWLINS: I do that to save time."

"The COURT: It is understood that the objection and exception goes to all this line of testimony."

"Judge DARNELL: We can't introduce the notes, because we don't have them. I have made that avowal."

(Testimony of Bascom Parker.)

The WITNESS: "A. I had them in my possession, and when the first note come due, I put it through the bank, and Mr. Van Dyke, I understand, paid it; it was paid."

That was one of them. Altogether there was that one and these two others. All were signed at the same time and at the same place, and by the same parties. I could not tell you the date when the third note, or the note not set out in this complaint was paid by Mr. Van Dyke. I think that was presented at his home. That was along in August or September; I can't just remember. That was the following year after the first note was executed, that was the one I sent through the bank; I discounted it with the Exchange Bank in Palatka, Florida. As to the other two notes, set out in the second amended complaint on pages 2 and 8, and which are being sued on in this action, they were past due, and R. C. Lubiens of St. Ansgar, Iowa was interested in the corporation with Mr. Van Dyke. I borrowed some money on those notes to Lubiens and Lubiens told me he would collect them. I did not send the notes to Lubiens, I took them home.

"Q. You took them to this bank in St. Ansgar?"

"A. I borrowed some money on them."

I received them back later from the bank. After that I kept them until I sent them out here. I delivered

(Testimony of Bascom Parker.)
the notes to an attorney, Mr. Robert E. Proctor. I sent them over to him along in April, I believe, or January, I forget the month of last year, I turned them over to Mr. Proctor of Elkhart, Indiana. I have not had them in my possession since. [129]

(Thereupon the witness was temporarily excused)

(Thereupon there was admitted in evidence the deposition of Robert E. Proctor, taken on stipulation on behalf of the plaintiff)

DEPOSITION OF ROBERT E. PROCTOR

My name is Robert E. Proctor. I am 50 years of age. My residence is 201 Monger Building, Elkhart, Indiana. I am a lawyer. I have known the plaintiff Bascom Parker, about twenty-seven years. I have acted as attorney for the plaintiff, Bascom Parker, from about May 1, 1930 to and including the present date, March 6, 1933.

I have seen and had in my possession two certain instruments purporting to be promissory notes, one for the sum of $5000. bearing date Chicago, Illinois, October 30, 1917, and payable on or before December 30, 1918 at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa, and bearing interest at 6% per annum, and the other for the sum of $5000. bearing date Chicago, Illi-

(Deposition of Robert E. Proctor.)

nois, October 30, 1917, payable on or before June 30, 1919, at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa, and bearing interest at the rate of 6% per annum, and signed by Hoval A. Smith and Cleve W. Van Dyke.

I first saw these notes on or about May 28, 1930, when they were brought to my office, Suite 201 Monger Building, Elkhart, Indiana, by Bascom Parker and his son Carson Parker, of Niles Michigan, and left with me for collection. I forwarded them to Graham Foster, attorney at law, at Globe, Arizona, on June 30, 1930. These notes were forwarded for collection and suit if not collected without suit. I wrote a letter to Graham Foster, enclosing said notes. He acknowledged receipt of same by letter dated July 5, 1930. A copy of my letter to Mr. Foster and the original letter from him is attached hereto. [130]

(Thereupon said documents attached to said deposition were read in evidence, and are in words and figures following:

"COPY

"ROBERT E. PROCTOR
Monger Bldg., Elkhart, Indiana
June 30, 1930

"Mr. Graham Foster,
Globe, Arizona
Dear Sir:

"I am enclosing herewith the following notes:

(Deposition of Robert E. Proctor.)

Amount, $5000.00; Payable to, Bascom Parker; When due, December 30, 1918; Balance due, $8171.95. Amount $5000.00; Payable to, Bascom Parker; When due, June 30, 1919; Balance due, $8196.34.

both notes being dated October 30, 1917, at Chicago, Illinois, and bearing interest at the rate of 6% per annum and both signed by H. A. Smith and Cleve W. Van Dyke. Both notes are to bear 7% interest after maturity.

"Will you please take this up with Mr. Van Dyke and advise me at once what can be done with these notes.

Yours very sincerely.

REP/r

Enc. "

"GRAHAM FOSTER
Attorney at Law
Globe, Arizona

July 5, 1930

"Mr. Robert E. Proctor,
Monger Building,
Elkhart, Indiana.

Dear Sir: [131]

"In Re: Bascom Parker vs. Hoval Smith & Cleve Van Dyke

"Your letter of July first with two notes, dated October 30, 1917, for *$500.00* each, one

(Deposition of Robert E. Proctor.)

payable December 30, 1918, and the other June 30, 1919, to Bascom Parker, arrived on this morning's mail.

"I note on the note due December 30, 1918, a payment on April 14, 1927 and a payment on June 13, 1927 of $500.00 each endorsed thereon.

"I also note the other note has a payment of $500.00 endorsed as having been paid on May 31, 1927, and the same amount on July 20, 1927. When these notes were executed, the statute of limitations in our state was four years. It is now six years. I anticipate the statute of limitations will be pleaded as a defense, and therefore any correspondence had with the makers of the notes may be very material. Whether the payments above referred to were made before the statute had run or after it had run may also be material. That is, there may have been a valid estension of time to toll the statute beyond the date of such payments.

"I have not had the opportunity to make a close examination of the authorities, beyond the authorities in this state, upon this question. Generally, a payment before the statutes have run will toll the statute, while a payment made afterwards may not do so.

"I wish you would give me such information along this line that you may have by return mail. Cleve W. Van Dyke is financially responsible. He disposed of his Public Utilities Hold-

(Deposition of Robert E. Proctor.)

ings during the past year at a price around $800,000.00. He has considerable property in this county and also in other counties [132] in this state. I do not know the financial standing of Hoval A. Smith. I have known of him for a very long time. He has been associated with Cleve W. Van Dyke in several matters. I would appreciate a check for $250.00 on account.

Yours truly,

(Signed) Graham Foster

GF-fg "

(Thereupon the reading of the deposition into evidence was continued)

Since forwarding the notes, as I have heretofore testified, I have not seen them, or either of them. I have examined copies of the first amended complaint and the second amended complaint. The notes as set forth in the second amended complaint in this action in paragraph III of the first cause of action and paragraph III of the second cause of action, are true and correct copies of said promissory notes, and each of them. I have not read the original complaint. The copies of the notes as set forth in the first amended complaint are true and correct copies of the original promissory notes.

I have seen a copy of a letter dated January 1st, 1927, and addressed to Mr. Hoval A. Smith care of Senator Ralph H. Cameron, Senate Office Build-

(Deposition of Robert E. Proctor.)

ing, Washington, D. C., and purporting to have been written or dictated by defendant Cleve W. Van Dyke. A copy of that letter was delivered to me by Bascom Parker of Niles, Michigan, on or about May 26, 1930, at the same time he delivered the promissory notes to me for collection. It was kept in my file of the case of Bascom [133] Parker vs Hoval A. Smith and Cleve W. Van Dyke, my file No. 3724, until January 26, 1933, when I forwarded it to attorneys Kingan, Darnell & Naye, by mail to Tucson, Arizona. The copy of said letter has been in my possession continuously from on or about May 26, 1930, until I forwarded and transmitted it to attorneys Kingan, Darnell & Nave on January 26, 1933.

(Thereupon the copy of said letter in the envelope, registered mail, mailed at Elkhart, Indiana, January 27, 1933, registered to Kingan, Darnell and Nave, was marked Number 4 for identification)

I have never read the original complaint, but the copy of the letter is copied correctly in the first and second amended complaints in this action, with the following exceptions:

> "1. In the second amended complaint, in line 1, page 4, the figure $5,000 should read $15,000.
>
> "2. In the second amended complaint, in line 20, the same being line 4 of the second paragraph, on said page 4, the word 'and' should read 'had'.

(Deposition of Robert E. Proctor.)

"3. In the second amended complaint, in line 39, the same being line 10 of the third paragraph, on said page 4, the word 'the' should be added at the end of said line.

"4. In the second amended complaint, in line 13, the same being line 2 of the second paragraph on said page 5, the word 'obliged' should read 'obligated'."

(Thereupon, at the request of Judge Darnell, no objection being made, the copy of the letter in the complaint was amended in open court as testified to by Mr. Proctor)

(Thereupon the following exhibit attached to the deposition was read) [134]

"Copy

KINGAN, DARNELL & NAVE
Consolidated Nat'l Bank Bldg.,
Tucson, Arizona.
January 21st, 1933.

"Mr. Robert E. Proctor,
Monger Building,
Elkhart, Indiana.

"Dear Sir:

"In Re: Parker v. Van Dyke, et al

"This morning we were served with a notice for inspection of notes sued upon.

"That is the title of the motion, but the motion seeks that the defendant Van Dyke, or his attorneys, be given and opportunity at the

(Deposition of Robert E. Proctor.)

earliest convenient date to inspect the original of that certain alleged letter, a copy of which is contained in paragraph 5 of plaintiff's second amended complaint; said original letter being addressed to Mr. Hoval A. Smith, dated January 1, 1927, and signed by Cleve W. Van Dyke, in accordance with paragraph 4464, 1928 Arizona Code.

"The defendant alleges that he cannot properly prepare an answer to plaintiff's second amended complaint until defendant, or his attorneys, have inspected the letter for the purpose of ascertaining the authenticity of the signature attached thereto, and for the further reason of affirming the dates contained in said letter as to whether or not there has been a typographical error, as alleged in paragraph 6 of plaintiff's second amended complaint.

"This motion will probably be granted and we shall have to produce the copy in your possession which was delivered to Mr. Parker.

"We must know at once whether or not Mr. Parker, and other essential witnesses, will come to Tucson for this trial. [135] If not, the procedure for taking depositions, as you know, is rather more cumbersome in the Federal Court than in the state courts, and we shouldd proceed at once to take any depositions necessary.

"Please let us hear from you fully,

Very truly yours,

KINGAN, DARNELL & NAVE

GRD:G By George R. Darnell"

(Thereupon the deposition of Carson P. Parker was admitted in evidence).

DEPOSITION OF CARSON P. PARKER

My name is Carson P. Parker, my residence is 1623 Oak Street, Niles, Michigan. I have known the plaintiff Bascom Parker for forty four years. I am his son. I am acquainted with Mr. Robert E. Proctor, an attorney at law of Elkhart, Indiana, and have known him about twenty five years. Mr. Proctor was the attorney for Mr. Parker from May 1, 1930 to the present time.

Either on the date the notes were executed or the following day, at Niles, Michigan, in the home of my father, Bascom Parker, at 401 Main Street, where I was living at that time, I saw two instruments, purporting to be promissory notes, one for the sum of $5000 bearing date Chicago, Illinois, October 30, 1917, and payable on or before December 30, 1918, at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa, and bearing interest at 6% per annum, and the other for the sum of $5000 bearing date Chicago, Illinois, October 30, 1917, payable on or before June 30, 1919, at the St. Ansgar Bank of Brush, Lubiens & Annis at St. Ansgar, Iowa, and bearing interest [136] at the rate of 6% per annum, and signed by Hoval A. Smith and Cleve W. Van Dyke. I saw them at least a dozen times during the period from October 31, 1917 until about May 26, 1930. I have

(Deposition of Carson P. Parker.)
read what purports to be copies of said promissory notes in the first amended complaint and in the second amended complaint. They are true and correct copies of the promissory notes which are heretofore described in the preceding interrogatories, the originals of which I have seen and read. I first saw these notes when my father, Bascom Parker, returned from Chicago to our home in Niles, Michigan on October 31, 1917. The notes were kept in a lock box rented by the family in the City Bank and Trust Company in Niles, Michigan, to which box I had access. I saw the notes at least at dozen times during the period from October 31, 1917 to May 26, 1930, when the notes were taken by my father to the office of Robert E. Proctor at Elkhart, Indiana. I accompanied my father to the office of Mr. Proctor and was present when he delivered the notes to Mr. Proctor for collection. The only time these notes were out of Niles, except when delivered to Mr. Proctor for collection, was when they were forwarded to the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa, for a period of more than one year. They were then returned to my father at Niles. I did not see them while they were in Iowa, but did see them immediately upon their being returned to Niles.

(Thereupon the deposition of Mrs. Annie E. Parker was admitted in evidence).

DEPOSITION OF MRS. ANNIE E. PARKER

My name is Mrs. Annie E. Parker. My residence is at 1651 Oak Street, Niles, Michigan. I have known the plaintiff Bascom Parker for fifty years. I am his wife. I have known Mr. Robert E. Proctor, an attorney at law, at Elkhart, Indiana, [137] about twenty seven years. Mr. Proctor was the attorney for Mr. Parker from about May 1, 1930 to the present time.

I first saw the two instruments purporting to be promissory notes, one for the sum of $5000 bearing date Chicago, Illinois, October 30, 1917, and payable on or before December 30, 1918, at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa, and bearing interest at 6% per annum, and the other for the sum of $5000 bearing date Chicago, Illinois, October *30, 1919,* at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa, and bearing interest at the rate of 6% per annum, and signed by Hoval A. Smith and Cleve W. Van Dyke, when my husband Bascom Parker returned to our home at Niles, Michigan, with the notes, the day after they were executed. I saw them at least a dozen times between the period from October 31, 1917, until about May 26, 1930. I have read what purports to be copies of said promissory notes in the first and second amended complaint. The copies of said notes as set forth in the complaint, or amended complaints, that I have read, are true and correct copies of the promissory notes which are heretofore described

(Deposition of Mrs. Annie E. Parker.)
in the preceding interrogatories, the originals of which I have seen and read.

I first saw these notes when Bascom Parker returned to our home at Niles, Michigan, from Chicago, Illinois, on October 31, 1917. The notes were kept in a desk in the house for some little time, where I saw them frequently, and were then taken to a lock box in the City Bank and Trust Company at Niles, Michigan, rented to the family, and to which I had access, and where I saw them several times. I saw the notes when they were sent to the bank of St. Ansgar of Brush, Lubiens & Annis, at St. Ansgar, Iowa, for a collection. I saw them again when they were returned from the St. Ansgar bank and then again when they were taken from the bank at Niles, Michigan, to be delivered to Mr. Proctor for collection. [138]

(Thereupon the deposition of Mary Reiner was admitted in evidence)

DEPOSITION OF MARY REINER

My name is Mary Reiner. My residence is 1500 West Indiana Avenue, Elkhart, Indiana. I am a stenographer. I am employed by Robert E. Proctor, and was in his employ during the month of May, 1930. I have known the plaintiff Bascom Parker since May, 1930. I know a Miss Chleo Dine-

(Deposition of Mary Reiner.)

hart. She has been employed in the same office as myself for about eighteen years.

I have seen the two instruments purporting to be promissory notes, one for the sum of $5000, bearing date Chicago, Illinois, October 30, 1917, and payable on or before December 30, 1918, at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa, and bearing interest at 6% per annum, and the other for the sum of $5000, bearing date Chicago, Illinois, October 30, 1917, payable on or before June 30th, 1919, at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa, and bearing interest at the rate of 6% per annum, and signed by Hoval A. Smith and Cleve W. Van Dyke. I first saw them on or about May 26, 1930, when they were handed to me by Miss Chleo Dinehart, in the office of Robert E. Proctor. On June 30, 1930, these notes were forwarded to Mr. Graham Foster, at Globe, Arizona. I typed the letter in which the notes were enclosed, at the direction of Miss Chleo Dinehart, enclosing the notes in the letter and mailed the letter.

I have read the copies of the first and second amended complaints in this action. The copies of the notes contained in the first and second amended compaints, copies of which I have read, are true and correct copies of the promissory notes described in the preceding interrogatories. I base this statement on the fact that I saw the notes when they were left with Mr. Proctor for collection and

(Deposition of Mary Reiner.)
again when I enclosed them in a letter [139] to Mr. Proctor at Globe, Arizona. I have never seen them since they were forwarded to Mr. Foster, and they have never been in Mr. Proctor's office since that time.

(Thereupon the deposition of Miss Chleo Dinehart was admitted in evidence)

DEPOSITION OF MISS CHLEO DINEHART

My name is Chloe Dinehart. My residence is 2101 Prairie Street, Elkhart, Indiana. I am a secretary. I am employed by Robert E. Proctor, and was in his employ during the month of May, 1930. I have known the plaintiff Bascom Parker since May, 1930. I know Miss Mary Reiner. She is employed in the same office as I am and has been so employed for the past five years.

I have seen the two instruments purporting to be promissory notes, one for the sum of $5000.00 bearing date Chicago, Illinois, October 30, 1917, and payable on or before December 30, 1918, at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar, Iowa, and bearing interest at 6% per annum, and the other for the sum of $5000. bearing date Chicago, Illinois, October 30, 1917, payable on or before June 30th, 1919, at the St. Ansgar Bank of Brush, Lubiens & Annis, at St. Ansgar,

(Deposition of Miss Chleo Dinehart.)

Iowa, and bearing interest at the rate of 6% per annum, and signed by Hoval A. Smith and Cleve W. Van Dyke. I first saw these notes on May 26, 1930, when Mr. Parker left them with Mr. Proctor for collection and Mr. Proctor turned them over to me.

On June 30, 1930, I dictated a letter to Miss Mary Reiner, which letter was addressed to Graham Foster at Globe, Arizona, in which letter the notes were forwarded to him for collection. I did this at Mr. Robert E. Proctor's direction. [140]

I have read the copies of the first and second amended complaints in this action. The copies of the notes set forth therein are true and correct copies of the promissory notes described in the preceding interrogatories. I know from the fact that I examined them at the time they were turned over to me by Mr. Proctor. I have never seen them since the day they were forwarded to Mr. Graham Foster, and they have never been in this office since that day.

TESTIMONY OF FRANCES GIACOMA

Frances Giacoma, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct Examination

My name is Frances Giacoma. I reside now in Phoenix, Arizona, and have resided there about two

(Testimony of Frances Giacoma.)

years. I am now employed by the Corporation Commission. I lived in Globe, Arizona, up until 1931. While in Globe I was employed by Graham Foster from December, 1928 to January 1931. I was a stenographer in Mr. Foster's office. I recall the matter of the preparation of the complaint in this case in Mr. Foster's office. I wrote the original complaint in this action, filed January 21, 1931.

> "Q. Now I will call your attention to the notes copies—copies of the notes in this complaint, and ask you whether or not at the time you wrote the complaint, you had the original notes in your possession?"
>
> "Mr. CHARLES RAWLINS: I assume our objection goes to this?"
>
> "The COURT: The record may so show". [141]
>
> "Mr. CHARLES RAWLINS: And our exception goes to the ruling?"
>
> "The COURT: All right."
>
> "The WITNESS: Yes, I copied these notes from the original notes."

I do not know what became of the notes after I had typewritten the complaint. I never saw them after that. I don't recall what I did with them after I wrote the complaint. At the time this complaint was written Mr. Foster was located in the Jones Building. We moved from that building to the Michaelson Building, I think it was, and the

(Testimony of Frances Giacoma.)

files went with us in the office. He removed again to Phoenix. I do not know whether those files were moved to Phoenix, but I know he did move to Phoenix.

Cross Examination

I was working when he moved from the Jones Building. This complaint was prepared in the Jones Building, I think. I think it was prepared at the time it was filed. I worked for him from December 1928 until about—on or about the 30th day of January, 1931.

I don't know about the date the complaint was filed. I left there about the 30th day of January, 1931, and I know I prepared the complaint. I do not know when Mr. Foster moved to the Marks Building. The notes that I copied into this complaint had signatures on them. I am sure of that. I have not seen them since that time. They were signed by Hoval A. Smith and Cleve Van Dyke. I am positive about that. I got them when I was making out the complaint; I copied them into the complaint, and I don't remember seeing the notes after. I don't know where the Fosters kept papers of that kind. I was familiar with the affairs of the office, but I don't know where he kept those notes. I don't remember if he had a place where he kept notes. I don't know whether or not he took all of his [142] files from the office to Phoenix. I don't know the exact date when he moved. I don't know how many times he moved when he

(Testimony of Frances Giacoma.)
got to Phoenix. I don't know whether he was in the Title and Trust Building for a while and the Security Building.

(Witness excused)

TESTIMONY OF JAMES R. MALOTT

James R. Malott being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct Examination

My name is James R. Malott. I am a practicing attorney at Globe, Arizona. I have practiced law there about eighteen years. I am a member of the firm of Morris & Malott. I knew Mr. Foster, the attorney for the plaintiff in this action in his lifetime. He died, as I recall, in August of 1932. Upon his death Mrs. Foster got in touch with me—I was in Los Angeles at the time, and I came home and was requested by her to go through his files, and to take over his files and the business. That is, notify his clients of his death, and deliver the files to them. In regard to the files in this case, which is the case of Bascom Parker, plaintiff, against Hoval A. Smith and Cleve W. Van Dyke, defendants, number L-202, Globe, I took charge of that file, and notified the client or the attorney for the plaintiff in this case of the situation. I made a search for the notes involved in this action. I delivered the files in this case to your office. Before delivering

(Testimony of James R. Malott.)
it to your office I made a search in the file for the notes the first time that it was presented to me. I might explain, before I came, Mrs. Foster had segregated a so-called "live file", which required immediate attention after Graham's death, Mrs. Foster said. This was one [143] of those pending matters, and she requested that I take some action in respect to those matters, and in going through this file before it was moved up to my office, I noticed that the notes were missing, and called her attention to that fact before the files were sent up to Globe, and in endeavoring to locate the notes, or the notes that were missing there, we went to several of the banks in Phoenix to locate a safety deposit box, and later I wrote to all of the banks I knew of in Phoenix to locate a safety deposit box, but we found none; Mr. Foster had no safe in his office in the Security Building in Phoenix, where he died.

I made search and inquiry in Globe, and I believe Miami, with reference to the notes. We either called up or wrote to the banks to see if Mr. Foster had a safety deposit box, and he had none. As to during what period of time I searched for those notes, I could verify the date of those letters that I wrote to the different banks, but sometime after the files were turned over to you, we wrote to those different banks, possibly in November of 1932, or thereabouts, and received their reply, and as I had time, I went through the files of Mr. Foster that we delivered to you, and checked, not

(Testimony of James R. Malott.)

only for those notes, but to see what the status of the files were. I was not able to find the notes. I took the matter up with Mrs. Foster and made a search for them.

"Q. Was she able to give you—did she make a search to your knowledge?"

"A. She advised that she did not know where——"

"Mr. CHARLES RAWLINS: We object to that as hearsay."

"The WITNESS: She suggested that I should inquire of certain other people."

I did inquire and could not discover the notes. Mrs. Foster is at Plainfield, New Hampshire. She left Phoenix about a month after Mr. Foster's death, as I recall, early in September [144] of 1932, and has been either in Plainfield or employed since that time.

I know Cleve W. Van Dyke, the defendant in this case.

"Q. Do you know whether or not Mr. Van Dyke was absent from the State of Arizona subsequent to January, 1927, Mr. Malott?"

"A. Yes."

"Q. Do you know where he lived during his absence from the state of Arizona?"

"A. Well, that depends on what you term 'lived'."

"Q. Well, where he ate and slept?"

"A. Well, I have met him over in Long Beach since that date."

(Testimony of James R. Malott.)

On one occasion, I believe I went to his home or his residence, and on one occasion I met him in an office. As I recall, it was a cottage bungalow or something in Long Beach, North Long Beach. I can't recall that his wife was present at that particular time. I think she was in Long Beach at that time. I could not tell you whether his daughter was there. The time I went to his residence, I can't be sure of; I know I was over there on two occasions when I met Mr. Van Dyke in 1928. One was early in the spring, and one was in August; I remember the August visit. I do not know when Mr. Van Dyke left Globe that year.

> "Q. Do you know he was absent from Globe?"
>
> "A. Well, Miami, I assume you mean; he lived at Miami."
>
> "Q. Yes, I mean Miami?"
>
> "A. No, I could not give you any dates. I understood he was away over there, and I went to see him in Long Beach on two occasions."

At the time I first went over to Long Beach I do not know how long he was absent from the State of Arizona; nor the next time [145] I went over to see him.

Cross Examination

After I received the notice, I think it was about three days that I was in his office at Phoenix. I do not know who was in the office before that. As

(Testimony of James R. Malott.)

to who had handled the papers or what shape they were in before I got there, only I inquired, and received the information from Mrs. Foster. I don't think I made a search for any notes at that particular time, other than I went through a few urgent files. I did not take those to Globe with me at that time. I took them to Globe the following week, I think; possibly eight or nine days after that. The live files, those important files, I had taken to Globe, and the balance, I think there were four filing cases, were shipped by Alabam stage. That was possibly two or three weeks after his death. I did not go to his office there that he had in Globe in the Michaelson Building. That office was a storeroom for Mr. Foster's books, and I think there were some other books there. Hill and Hill officed in there. He left them there.

"Q. And you didn't go through any of those at all in your office?"

"A. Very little."

I did not go through that office in the way of a search; I examined. I have been in the office. I could not tell you whether he had a safe when he lived in Globe. I think there was a safe there in the Michaelson office. I could not tell you if it was marked "Foster & Foster". I do not recall that I had been in that safe. The safe, I think, was turned over to Mr. Michaelson. I don't know whether that is his safe, or the Hill and Hill safe. I could not tell you if that is the same safe that he had in the

(Testimony of James R. Malott.)

Jones Building. I could not tell you if I ever saw that in the Jones Building. At the time of his death he was officing in the Security Building in Phoenix. When he first went to Phoenix, he was going in partnership with Harold Elliott. I have never been in that office [146] while he was there. I understand he occupied that building a very short time, but I could not tell you positively; just a few months I imagine.

(Witness excused)

"Judge DARNELL: We offer at this stage, the copies of the notes in the complaint, and ask that they be introduced in evidence as set out at page 2 and page 8 of the second amended complaint."

"Mr. CHARLES RAWLINS: I object to the introduction of those notes for the reason that the action was not commenced in Arizona without four years after the maturity of the notes, the notes being foreign notes, and that they are barred by the statute of limitations. And we further object for the reason that it appears from the evidence that they have been barred, and there is nothing in the record to revive the running of the statute of limitations. The letter of January 1, 1927, is no evidence, signed or written by this defendant, under the construction placed upon this statute by the Supreme Court of Arizona. Now, we set that up in two ways: No evidence that it was written or signed and no evidence that he signed this on January 1, 1927, and

there is nothing in the record today to relieve the statute of limitations in Arizona. This is a foreign bill, and under the laws of Arizona, it must be sued upon within four years after its maturity, and the Arizona statute and the construction placed upon the laws of Arizona by the Supreme Court of this state prevails. This is the forum, and not in Iowa."

"The COURT: I have ruled on that, in my judgment. We have gone through that, and my mind is made up, and the notes will be admitted. That is, a copy of the notes will be admitted in evidence at this time." [147]

"Mr. CHARLES RAWLINS: Now, our objection is overruled and exception noted?"

"The COURT: Yes, very well."

"Mr. CHARLES RAWLINS: Now, we take an exception to the foundation, that they have been lost; it has not been shown that they are lost yet."

"The COURT: Counsel has raised the section of our Arizona statute."

"Judge DARNELL: We are offering secondary evidence to show that the notes, that the execution of them were admitted, and the turning over of the notes to Mr. Foster, and search by Mr. Malott, and we are unable to produce them; they have been lost. They were not turned over to us as succeeding attorneys in the case and we can't produce them, and we have shown why."

"The COURT: The Court has ruled on that."

"Mr. CHARLES RAWLINS: May we have an exception?"

"The COURT: Yes."

Thereupon said documents, appearing on pages 2 and 8 of the second amended complaint in this action, are now introduced and admitted in evidence, and are in the words and figures following:

"Page 2

"$5,000.00 Chicago, Illinois, October 30, 1917

On or before December 30, 1918, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker, at The St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.

It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest [148] not paid when due, to bear interest at 7 per cent per annum from maturity.

The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

(Sgd) HOVAL A. SMITH
CLEVE W. VAN DYKE

No. 23716
P. O. Miami, Ariz.
and Chicago.

[Endorsed]: April 14th, 1927, paid hereon by check, $500.00
June 13th, 1927, paid hereon by check, $500.00"

"Page 8

"$5,000.00 Chicago, Illinois, Oct. 30. 1917.

On or before June 30, 1919, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker at The St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.

It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

(Sgd) HOVAL A. SMITH
CLEVE W. VAN DYKE

No. 5793
P. O. Bisbee Ariz.
Miami, Arizona.

[Endorsed]: May 21st, 1927, paid
hereon by check, $500.00
July 20th, 1927, by check, 500.00"

[149]

TESTIMONY OF BASCOM PARKER (RECALLED)

Bascom Parker, recalled as a witness in his own behalf, testified as follows:

Direct Examination

The notes now in evidence, set out in the second amended complaint on page 2 and page 8, have not been paid. On the note set out on page 2, there is a payment of $500.00 made on April 14, 1927. It is on this note here (indicating) April 14th. Another payment was made on that note for $500.00 on June 13, 1927. That is as to the note that is payable on or before December 30, 1918. On the note payable on or before June 30, 1919, set out on page 8 of the second amended complaint, there were payments made by check on May 21, 1927, of $500.00 and July 20, 1927 of $500.00. That is not all that has been paid on them. He paid on April 14th, he gave me that check when I was in California. That is credited on the note. I have testified to that, April 14, 1927, by check, five hundred dollars. Nothing more has been paid, two thousand dollars; one thousand dollars on each one.

I saw Cleve W. Van Dyke on or about January 1, 1927, in his office at Miami. We had considerable talk a couple of days before that on our trip to Phoenix and back relative to the payments of these notes, but I met him in the morning there, and he called up Hoval Smith, and thereafter advised me that Hoval Smith, the last he heard was he was

(Testimony of Bascom Parker.)

in New York, but he would be back in Washington probably in three or four days, so Van Dyke wrote a letter to Hoval Smith in my presence; he dictated the letter to his stenographer. He gave me a copy of that.

"Q. A copy that he signed right there in your presence?"

"A. Copy of the same letter."

I saw it written, and Mr. Van Dyke, when she finished, took the copy and walked over to me and handed it to me. [150]

"Mr. CHARLES RAWLINS: My objection made to this letter still goes?"

"The COURT: Yes. He is examining about this letter. I don't recall just what the testimony was in regard to the execution of the letter. If you want that testimony, I will have the reporter read it."

"Judge DARNELL: The testimony is that he met Mr. Van Dyke at his office on January 1st, 1927 at Miami, Arizona, and Mr. Van Dyke called up Hoval Smith in relation to ascertaining the whereabouts of Mr. Smith, of Hoval A. Smith, and he got the information that he would be in Washington, and a letter there would reach him, and thereupon the defendant Van Dyke dictates to his stenographer a letter, and when it is written by the stenographer, Mr. Van Dyke took the carbon of that letter and

(Testimony of Bascom Parker.)

handed it to this witness, and I am just about to ask the witness to identify that copy."

(Thereupon Plaintiff's Exhibit Number 4 for Indentification was examined and read by the witness.)

That is a carbon copy of the letter dictated to the stenographer and written in my presence, and which Mr. Van Dyke handed to me. That is absolutely the letter that he wrote at that time and gave me a copy. I went to Miami to see Mr. Van Dyke and see if I could get payment of those notes; that is how it happened that the defendant Van Dyke wrote this letter. We were having a nice little talk, and he got a telephone call, and I think somebody from town, on the streets, and had a talk, and after he had a talk, he told this fellow to notify Pat to have the Hudson ready. And he come over and says to me "come on and ride over to Phoenix with us", and I did. Pat Van Dyke [151] of Miami or Globe drove, and he is a good driver too, by the way, and Cleve and I rode over, and I stopped at the hotel—we got there in the evening that night, and we were there the next day, and we left there about dark, and I didn't want to go on account of the roads, but we started and left, and we got in to Miami kinda late, and I went to bed, and I met him the next morning and we got this letter.

"Q. What was said about him writing this letter, if anything by him to you, before writing it?"

(Testimony of Bascom Parker.)

"A. Why, he had told me that he supposed these notes were paid just the same as he did in that letter. He says 'Parker, I settled with the St. Ansgar Bank, Hoval Smith and I; Hoval transacted the deal, and all notes would be cleaned up', and he says 'I understood that those notes were cleaned up; that the bank still had them'. 'Well', I says 'you see they don't have them', so then after talking over our affairs, then he called up Hoval and got Mrs. Smith and found Hoval was out, and then he dictated that letter to get it off to Hoval, and Mr. Van Dyke agreed with me he would not pay any of those notes at the St. Ansgar Bank until they took up my two notes."

"Judge DARNELL: Now, Your Honor, we offer this in evidence."

"Mr. CHARLES RAWLINS: We object to it; it is immaterial and incompetent and does not meet the requirements of our Code. It is not an admission in writing, signed by the party sought to be charged, admitting the indebtedness has not been paid. In other words, it does not meet the requirements of the rule laid down by the Supreme Court of this state that [152] it must be an instrument in writing, signed by the party sought to be charged, admitting the existence of the debt, and acknowledging that it has not been paid. We object to the introduction of the letter for the reason

that it does not comply with the staute of Arizona; it is neither an instrument in writing signed by the party sought to be charged, in which he acknowledges the existence of the debt or willingness to pay the same. Nor, is it an executed instrument, the letter, and made no promise in writing at any time, and no foundation has been laid for its admission. Secondary evidence."

(Argument)

"The COURT: Are you introducing this merely as a copy?"

"Judge DARNELL: No, Your Honor, we introduce this because it was his written statement, dictated by him and adopted by him when he handed it to Mr. Parker. I wish Your Honor to see and look at this."

"The COURT: I have seen it."

"Judge DARNELL: We offer it as his letter. We demanded the original, and they said they didn't have it, and haven't got it now. They haven't got one with his signature."

"Mr. CHARLES RAWLINS: This not only is not signed by him as the Code requires, but the two things must concur. They haven't anything, except something dictated to the stenographer. There is no proof that it was signed by him." [153]

"Judge DARNELL: Now, we offer this as an original document."

"Mr. CHARLES RAWLINS: Now, we object to it."

"The COURT: I am going to reserve my ruling on this."

"Judge DARNELL: Now, if the Court please, in further support of our motion, I want to call the court's attention now to the signature 'Cleve W. Van Dyke' underneath."

"The COURT: That is typewritten."

(Argument)

"The COURT: I am not going to make a final ruling on that at the present time. The execution of this is the important point here, and I am going to admit the paper subject to final ruling in the case. If I am not satisfied that it is admissible, I will rule it out. The law says that it must be signed by the party to be charged, either under the Iowa or Arizona law."

"Judge DARNELL: I want Your Honor to take the citation."

"The COURT: I have that, 58 Corpus Juris. The original instrument which you rely on, was the one sent to Mr. Smith?"

"Judge DARNELL: No, we rely on this instrument that we are offering. On this (indicating) one, written by Van Dyke through his agent, signed by the agent for Van Dyke, adopted by Van Dyke, and delivered by Van Dyke to Mr. Parker, all in one transaction. The fact may be that Mr. Smith may never have re-

ceived this. The fact that this was handed to Mr. Parker. Mr. Van Dyke may never have signed it, or he may have changed his mind and never mailed it. Or if [154] he did, it would be sent to Hoval A. Smith, and not to this party. We are offering this on the theory that it is his written instrument—his written statement, signed by him, and delivered to this plaintiff."

"The COURT: Have you got the letter which was supposed to be written to Mr. Smith in Washington?"

"Judge DARNELL: No, we do not have it; we don't know whether Hoval A. Smith ever had it or not."

"Mr. CHARLES RAWLINS: We have in the record here a demand for inspection of it, made January 21, 1933."

"The COURT: You avow you are not relying on that letter at all. If you relied on that letter, you would call upon Mr. Smith, who is a party, to produce that letter, would you?"

"Judge PATTEE: Yes. We rely on the admission in that, just as if he signed twenty copies, each one of them would be admissible; each one of them would be an independent instrument; each one of them would be proof of whatever was stated therein. If the one sent to Mr. Smith would be produced, it would be admitted."

"The COURT: It will be admitted, subject to the final ruling, but I have my grave doubts

(Testimony of Bascom Parker.)

whether this is such an instrument as is contemplated under the Iowa or Arizona laws."

"Mr. CHARLES RAWLINS: Wait just a minute, I hold in my hand the complaint filed in this action, and we now object to the introduction of this letter for the reason it is not a copy; Van Dyke's initials do not appear upon the copy set out in the complaint, and it is not the same letter." [155]

"Judge DARNELL: The initials were not put on that. We will ask to amend the complaint."

"Mr. CHARLES RAWLINS: Oh no."

"Judge DARNELL: If it becomes necessary to show the initials, we will ask to amend the complaint. We did not write that pleading."

"The COURT: I am going to admit it at this time, subject to the final ruling."

"Mr. CHARLES RAWLINS: We may have an exception?"

"The COURT: Very well."

"Mr. CHARLES RAWLINS: I presume, when the Court finally rules, we will have our exception then also, if the ruling is adverse to us?"

"The COURT: Yes."

(Thereupon said document was admitted in evidence as Plaintiff's Exhibit No. 4, and the same is in the words and figures following, to-wit:

EXHIBIT NO. 4 [156]

January 1,1927

Mr. Hoval A. Smith,
Care Senator Ralph H. Cameron,
Senate Office Building,
Washington, D. C.

My dear Hoval:

Mr. Bascom Parker, of Niles, Michigan, arrived in Miami a few days ago asking the settlement of two notes of $5,000 each, given to him in Chicago August 30, 1917, in payment for his stock in the Calhoun Timber Company. You will recall the deal.

This stock was purchased for the remaining stockholders of the company at the request of Mr. H. C. Olcott, acting for the trustees of the bondholders of the Calhoun Timber Company. The amount to be paid for this stock was $50,000; $25,000 of which was to be in Calhoun Timber Company bonds which were owned by the Calhoun Timber Company, and $10,000 in cash, and $15,000 in three $5,000 notes. These notes were to be the joint obligation of yourself, Mr. Lubiens and myself. The cash paid to Mr. Parker was a check against the $100,000 fund in the St. Ansgar Bank which we had borrowed from Thomas F. Cole, of New York. These notes were to have been paid when due. One of them came due in the following June and was sent out to me to Miami for collection. I paid this note. The two other notes have never been paid and form the basis of a demand on the part of Mr. Parker for payment at this time.

The stock was delivered and was transferred on the books of the company. One third of the stock was delivered to yourself, one third to H. C. Lubiens, and one third to myself. After the company became defunct the $100,000 owed to Thomas F. Cole became due and as you know I have paid this sum, so that puts me now in the position of having paid $15,000 of the $25,000 that was owing to Mr. Parker. After the first note was paid the other two notes were taken over by the St. Ansgar Bank, through Lubiens. Later on one of them was sent to me for collection by the St. Ansgar Bank. I refused to pay the same at the time because I had already paid the share due from me and later I paid a further sum of $10,000 which was the original cash paid to Mr. Parker.

The notes were returned to the St. Ansgar Bank from the Gila Valley Bank of Miami, the bank to whom they were sent for collection. The refusal was based upon the grounds that I did not owe the money, that the stock had been turned over to Mr. Lubiens and that he owed the money for the amount due, as I had paid my share in full.

Later on there were some differences between the St. Ansgar Bank on this Calhoun Timber Company matter and yourself and myself. Mr. Lubiens, who was the treasurer of the company, and who was mutually trusted by us at t e time, had gathered together a lot of notes which he had placed in the bank and which had been signed by us at various times, and for which we had received no consideration and for which the Calhoun Timber Company had received no consideration. In my opinion at the time this matter was brought to my attention by you and by Mr. Salisbury, the whole matter was a fraud and that the bank could not hold me for any amount.

Time went on and at your insistence an agreement was reached between ourselves and the St. Ansgar Bank.In order to avoid litigation we agreed to a settlement between the bank and ourselves with the understanding that all notes and obligations were to be included within this settlement. No notice has ever been received by me from the Bank of St. Ansgar or Mr. Lubiens that they had not taken up these notes when they were refused payment by me for the cause stated above. I was under the impression that Mr. Lubiens and the bank, having been notified by me that it was their obligation, had assumed these notes and that they were still held by them and was part of the consideration upon which our settlement was based. What was my surprise to learn the other day upon the arrival of Mr. Parker that the bank, instead of including these notes in our settlement as I presumed was being done, had returned the notes to Mr. Parker unpaid. And now Mr. Parker has presented these notes to me for payment.

Now, Hoval, I have tried to be patient in this matter, I have tried to be fair; I have assumed more than my share of the obligation of this disasterous enterprise; I have carried the load for you; I have carried the load for the bank and have paid out practically all the cash money that has been paid out since the final crash of the company. I have secured not one nickle or one dime in salvage from the company and I have even gone so far as to pay the $100,000 to Mr. Cole which was a joint obligation of yourself, the bank and myself.

I presumed the bank was trying to adjust this thing fairly and on a basis of equity and trying to clear up a nasty mess. When Mr. Parker arrived I explained to him fully what my relationship to the bank was on these matters. I told him that we now have due and payable a note to them of $10,000. He has notified me that

Marked for
Identification only
JUN 2 1933
J. [illegible], Clerk,
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA.
By Edward M. Zarate
Chief Deputy Clerk.
Case No. L-202-Phx
Parker vs Van Dyke

Admitted and Filed
JUN 2 1933
J. [illegible], Clerk,
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
By Edward M. Zarate
Chief Deputy Clerk.
Case No. L-202-Phx
Parker vs Van Dyke

we must not make this payment to the bank until his matter is adjusted.

I am writing you to inform you of the situation. I request now that you feel obligated to Mr. Parker to fulfill my statement to him that we will not pay this note to the Bank of St. Ansgar until the matter is adjusted, in other words, I request that you, upon your return to Arizona, stop at St. Ansgar, see Mr. Salisbury and present this matter to him. Mr. Parker would have levied upon this payment that we were about to make to the Bank of St. Ansgar had I not stipulated to him as stated above. I suggest that you now have a definite understanding with Mr. Salisbury in reference to this matter. I expect them to treat Mr. Parker as fairly as I have treated them. Our agreement with Mr. Parker was definite. Our arrangement among ourselves was well understood and Mr. Parker is only asking for his rights and what is legitimate. The fact of the matter is I am very much surprised indeed at the action taken by the bank in this matter, especially after the settlement that has been made between them and us. We were trying to seek a way out of our difficulties and the way out unloaded over a quarter of a million dollars of obligations upon myself, which, while it is unfair, was arranged in order to avoid troublesome litigation and a long period of contest and fighting. As you know, we discussed the matter and we decided that it would take a large sum of money and a long time to work out this litigation. My health was poor, your affairs were involved, times were hard and we felt that we might better make an amicable settlement rather than seek our rues in the court. It may be that Mr. Salisbury does not know about this situation, and if he does not, you should apprise him of it and clarify it as soon as possible.

With kindest personal regards, I am

Yours very truly,

(Testimony of Bascom Parker.)

"Q. (By Judge Darnell) Now, I will call your attention, Mr. Parker, to a letter dated May 21st, 1927, being Plaintiff's Exhibit Number 1 for identification, and ask you if you received that letter from Mr. Van Dyke?"

"A. Yes, sir."

(Thereupon said document was admitted in evidence as Plaintiff's Exhibit No. 1, and the same is in the words and figures following, to-wit:)

EXHIBIT NO. 1.

"Long Beach, Cal., May 21, 1927.

"Mr. Bascom Parker,
Niles, Mich.

Dear sir:

Enclosed please find my check for five hundred dollars as per our understanding.

I am sorry to have delayed the date but I was taken down with an attack of pneumonia and lost two weeks so when I got around again I had to rustle to get the price.

With kindest personal regards, I am,

Yours truly,
Cleve W. Van Dyke.

P. S. I am wiring you today so you may know it is enroute.

C. W. V."

(Testimony of Bascom Parker.)

"Q. I call your attention, Mr. Parker, to Plaintiff's Exhibit Number 2 for identification, and ask you if you received that letter from Mr. Van Dyke."

"A. I did."

(Thereupon said document was admitted in evidence as Plaintiff's Exhibit No. 2, and the same is in the words and figures following.) [160]

EXHIBIT NO. 2.

"Long Beach, Cal., June 13, 1927.

"Mr. Bascom Parker,
Niles, Michigan.

Dear Friend:

Enclosed please find my personal check for $500 as agreed when we met in Los Angeles, Cal.

My wife and daughter are spending a few days in Miami so I am enjoying the marvels of housekeeping.

Trusting that you may have good luck and fulfill some of your expectations

I am

Yours truly
Cleve W. Van Dyke."

"Q. I hand you Exhibit number 3 for identification, a letter of July 15th, 1927——"

"The WITNESS: Yes, sir, I received that."

(Testimony of Bascom Parker.)

(Thereupon said document was admitted in evidence as Plaintiff's Exhibit No. 3, and the same is in the words and figures as follows).

EXHIBIT NO. 3.

"Long Beach, Cal. July 15th, 1927.

"Bascom Parker,

Niles, Michigan.

Dear Friend:

Enclosed please find my personal check for $500 as per my promise to you. I hope that it may not be delayed enroute and that it will reach you by the twentieth of the month.

With kindest regards, I am,

Yours truly,

Cleve W. Van Dyke." [161]

Cross Examination

I received this letter or copy which I testified about after going to Phoenix; the next morning. After the receipt of this letter I left Miami at seven o'clock for Globe, and took the sleeper out of Globe. That was January 1st. I don't know as I remember what day of the week that was. I was in Niles, Michigan, when I received Exhibits 1, 2 and 3 in evidence. I never received them when I was in Iowa at all. Mr. Van Dyke wrote them to me from Long Beach, California. Mr. Van Dyke and I were not in Iowa at the time he wrote this letter of January 1st, 1927. We were in Arizona.

(Testimony of Bascom Parker.)

"Q. Now, did Mr. Van Dyke or Mr. Hoval Smith meet you in Chicago while you were there?"

"A. He said he would telegraph to meet me in Chicago. That is, for Hoval to wire to meet me in Chicago, but Hoval never wired."

Hoval never wired and I never met him there.

"The COURT: Q. That Hoval Smith was to wire you?"

"The WITNESS: Yes sir, that he would wire Hoval when he passed through to go to Iowa to wire me and ask me to meet him in Chicago, but Hoval never wired me."

I did not meet Mr. Smith in Chicago as a result of those letters shortly thereafter. The first time I have seen Hoval Smith was yesterday evening in the Coffee Shop of the Pioneer Hotel. I had not seen Hoval Smith for sometime before the date of this letter, the one of January 1, 1927. Absolutely the first time I saw him after the date of the letter of January 1, 1927 was yesterday at the Pioneer Hotel in Tucson, Arizona. I never met or saw him in Chicago and discussed this matter. At the time this letter was written I arrived in Miami about the 27th or 28th of December, and I remember that it was night, [162] it was about eight o'clock I guess. The same afternoon or the same day that I arrived in Miami I made the trip to Phoenix. I telephoned to Mr. Van Dyke at his home there, and he answered

(Testimony of Bascom Parker.)

the phone and told me to come to his office at a certain time that day, and he was calling Phoenix, and he invited me down there, and I rode down there with him. That was probably the same day I got there, or the next forenoon. I stayed in Phoenix that night, and as I remember, we got there while it was still daylight. We got there in the early evening, and we stayed there that night and all of the next day, and we left there just before dark or about dark, and returned to Miami. I left Miami the following evening.

That letter of January 1st was after I went to Phoenix; after I got back, absolutely. I did not dictate part of it. I did not suggest a word of it. He paced up and down the floor and gave the dictation to the stenographer, and he was telling just exactly as I know it. He was dictating the whole transaction just as I knew the transaction.

"Q. You heard the entire letter dictated?"

"A. I did."

"Q. Did he dictate any signature to the stenographer?"

"A. I could not say."

(Witness excused).

Testimony of

CLEVE W. VAN DYKE (Recalled)

Defendant, Cleve W. Van Dyke, being called by the plaintiff as an adverse party, on cross examination, under the statute, testified as follows:

Examination

I heard the testimony of Mr. Parker regarding the dictating of the letter that has been admitted in evidence as [163] Exhibit No. 4. It is only partially true. The whole story is confused and all mixed, and not in accordance with the facts. I dictated part of the letter. I was present when all of it was dictated and written. I was there all the time. Mr. Parker and myself and the stenographer were there. I think Miss Tanner was the stenographer. Mr. Parker dictated portions of the letter. Mr. Parker stated that he had been in discussion on the subject, and we visited along and discussed this thing, and we reached the point of where something should be done. I didn't know, just as he said, I didn't know those notes had not been taken up by the St. Ansgar Bank, but we made a settlement with the St. Ansgar Bank and assumed that those notes would be included in that situation, and there was a payment to be made by us to the bank, and he asked for a settlement from Mr. Smith along those lines, and so we, in our conversation, we were reaching out for an expression of our ideas, and we sat down and called the stenographer—it was on New Years Day, and the stenographer was not there, and

(Testimony of Cleve W. Van Dyke.)

we had to send for her, and it was a point where I was not clear, whether we would have the information, and together we dictated the letter. I did not tell the stenographer it ought to be signed. We did not sign it at all. I told the stenographer to whom to address the letter. The copy, when it was finished, was handed to Mr. Parker. I don't recall whether I handed it to him or the stenographer. If I did not hand it to him, I had her to hand it to him. My memory is that she handed it to him. I was there when she handed it to him. I did not make any objection. The letter was dictated and we discussed it on the way to Phoenix.

I did not sign the original letter. I did not mail it to Hoval A. Smith, because when we went to Phoenix we agreed instead of taking this letter, sendig this letter to Mr. Smith [164] having him go to St. Ansgar and discuss this affair, that it would be better to have him meet Mr. Parker in Chicago,

> "The COURT: I don't understand. You say that letter was written before you went to Phoenix?"
>
> "The WITNESS: Yes, the morning before going to Phoenix, we stopped in the office that morning and the letter was dictated at that time, but we did not stop to discuss it, because it was getting late, and I took this copy that was—Mr. Parker had the copy and we discussed it further on the way over, and during our discussion he decided that he would prefer that he would have

(Testimony of Cleve W. Van Dyke.)

a personal talk with Mr. Smith concerning this, so when I returned, I left immediately for Los Angeles with my family. This was on Saturday, the first of January, so on Saturday—Sunday I had to leave with my wife because my daughter was attending a boarding school in Pasadena so we had to be there, so we left on Sunday to Phoenix to take the train to go to Los Angeles. When I returned home after the trip, knowing that I would not be in the office again, I call my secretary and asked him to get those copies of this letter that had been typewritten, and to send Mr. Smith a wire—Mr. Smith was in New York. He wired Mr. Smith and requested him to meet Mr. Parker at Chicago."

I thought this letter was lost in the confusion. I don't think I ever asked Mr. Parker to hand me back the letter; I don't recall asking him for it. There was no reason for doing so. I don't recall that I asked Mr. Parker to return that letter which is in evidence here; I don't remember that. I don't recall calling up Hoval Smith at Warren to ascertain where this letter could reach Mr. Smith. I might say I frequently do that, and I might have. I would not say that I did or I would not say that I did not, but I knew where Mr. Smith was. I had his address; I had negotiations on with him at the time. He [165] was to go to Washington.

"Q. After you left—after you changed your mind, you left that letter in the possession of Mr. Parker?"

(Testimony of Cleve W. Van Dyke.)

"A. I would hardly call it a letter; it is just a rambling tentative thing that was drawn."

"Q. Whatever—whatever the characterization of that should be, it was left with Mr. Parker?"

"A. I don't recall ever asking him for its return; I don't believe I ever did. I don't recall it any way."

My daughter was attending boarding school in California. She has been for some time, before I went to California, and after I left there; all during the school term. My daughter was not living at home. She was at boarding school at Pasadena; not in the same town I was. She attended the Orton School.

(Witness excused.)

(Thereupon the plaintiff rested his case).

TESTIMONY OF CLEVE W. VAN DYKE.

Cleve W. Van Dyke, defendant, being called as a witness in his own behalf, and having been duly sworn according to law, testified as follows:

Direct Examination

I had a conversation with Mr. Parker in Los Angeles about 1927. They telephoned me where I was staying in Long Beach from the Woodward Hotel in Los Angeles, and asked me to come and

(Testimony of Cleve W. Van Dyke.)

see him, and I did the next day, I believe. That was along about the early part of April; sometime along the 8th, in there; 8th or 9th, I think, or maybe later. It was some place between April 8th and the 14th, I think, of 1927. That was after the date of the letter of January 1, 1927. I answered that telephone with a call through to my brother who was there, and he was there at another hotel, and I had dates with both, so I went up [166] and I called on Mr. Parker and stated the condition of affairs, and I told him I was glad he had returned, and I went down with him, I think, at the Savoy Hotel. I met him there and had our conference, and when we finished our conference, my brother and I returned to the Woodward Hotel to meet Mr. Parker. My brother is L. D. Van Dyke, but we call him "Pat". I met Mr. Parker first on this occasion with my brother Pat. At that time we discussed the notes and payment, and I told him that I had taken the matter up with you, and that you had advised me that the notes were outlawed in Arizona; that I did not owe them. But my contention all along the line was I never owed them. I told him that I did not owe the notes; the notes were for stock in one of his promotions, and that the property stood one-third to Mr. Smith, one-third to Mr. Lubiens, and one-third to myself, and there were Fifteen Thousand Dollars represented by three notes, and the notes had been drawn that way so that each one could take up their prorata share of the payment in that way. When the first note came due, it was sent to me and I paid it.

(Testimony of Cleve W. Van Dyke.)

Then we went into the genuineness of it, and he agreed with me on that—said he did, at least, and said that he also agreed that the notes were outlawed, and he stated "now, Van," he said "you know I can't sue you for it now. I might have sued during the period of time that they were not outlawed, and I believe I have got something coming because of that kind of treatment of you at that time, and the reason that I withheld it, I knew that the other fellows owed the money and you did not, and" he said "for that reason I feel I have got something coming. Now, I am very hard up and I need some money and I would like very much indeed if you would give me some consideration for that." "Well" I said "now, Parker, how much consideration do you feel would be satisfactory to you", and [167] he said "you pay me a Thousand Dollars on each one of those notes, and" he said "I will release you from further obligations and take a chance to get any further consideration out of the other two men." I told him I didn't have Two Thousand Dollars at the time. "Well", he said, "could you make it in installments", and we agreed on Five Hundred Dollars down and Five Hundred Dollars about thirty days apart. I said I would give him a check for Five Hundred Dollars, and I gave him Five Hundred Dollars each month until it was finally completed.

(Thereupon court adjourned until 9:30 o'clock on June 3, 1933, and after the reporter

(Testimony of Cleve W. Van Dyke.)

had read the last question and answer, the witness resumed).

After he had received the Five Hundred Dollars, I got into the car at Long Beach where we were at the time, and my brother took me over to the Woodworth Hotel, and I didn't see him again. We met on two spearate occasions, the first day in Los Angeles, and the second day in Long Beach, and we went for a ride, Mr. Pat Van Dyke, my brother, was driving. Pat Van Dyke was present at two of the three conversations between Mr. Parker and myself. Not at the first meeting; the first meeting was just a short meeting. When I made those payments, I sent a letter along with each check. Those letters are Exhibits 1, 2 and 3.

In the letter dated June 13, 1927, Exhibit 2, where I refer to "as per agreement" and "and understanding", that was the same understanding that I have just related. Those letters Exhibits 1, 2 and 3, were in accordance with our understanding and agreement as made at that time in Los Angeles. In order to comply with my agreement relative to those payments to Mr. Parker, I fulfilled my agreement with him, as we made it in Los Angeles. I paid him down a check for Five Hundred Dollars when the agreement was made, and then each succeeding month thereafter for three months I sent him a check for Five Hundred Dollars, and in each letter I stated it was in accordance with the new deal we had made, or agreement we had reached in [168]

(Testimony of Cleve W. Van Dyke.)

Los Angeles, and the settlement was full settlement of the account. That is the only understanding or agreement that I ever had with Mr. Parker relative to any payments of those notes after the date they were executed. I never had any agreement with Mr. Parker about paying those notes, other than the one in Los Angeles. After I made those three, in all, four payments on those notes, the last one in July, 1927, Mr. Parker, or any one else, did not demand any further payment from me prior to the institution of this suit, until Mr. Foster did. From the date of the last payment, in July, 1927, up until Mr. Foster started institution of this suit for Mr. Parker, no one in his behalf ever demanded any further payments on those notes from me.

In the letter dated January 1, 1927, I did not authorize my stenographer to whom I dictated the letter, to sign "Cleve W. Van Dyke" thereto. I did not at any time or at all ever authorize my stenographer or anyone else to sign my name on the typewriter "Cleve W. Van Dyke" or in any other form. I did not sign the original letter dated January 1, 1927, and it was never sent by me, or by anyone by my authority. Yesterday, when this letter dated January 1, 1927, was introduced in the testimony, was the first time I knew my name was printed on there by typewriter.

Cross Examination

Exhibit No. 4, being the letter of January 1, 1927, seems to be a carbon copy of the letter that I dictated

(Testimony of Cleve W. Van Dyke.)

in my office in Miami. The stenographer was a Miss Tanner and she was called on on New Years day. I had to call her in specially on this day, which was a holiday. That was on a Saturday. I don't know when Mr. Parker left for the east. He left me that night, if I remember. I saw him after that; we went to Phoenix after that, right after this letter—he was given this carbon copy and we drove to Phoenix, and it is my memory we came back [169] late that evening. My memory is that this carbon copy was handed to him by the stenographer. I was present. I made no objection to it; the letter was drawn for the purpose, as a tentative letter to explain the circumstances to Mr. Smith and to get him to do something. Miss Tanner was our regular stenographer. My memory is that this is a carbon copy of the letter that was written there. I no doubt saw the original of that letter. My memory is that the letter was left with the stenographer, and the carbon copy was handed to Mr. Parker, and we proceeded immediately for Phoenix. This was being done in the interim while my brother was getting the car to go to Phoenix, and as soon as the letter was dashed off, Mr. Parker got his carbon and we got into the car and drove to Phoenix, and discussed the letter and the contents on the way over there, and after the discussion, we said we would not use it; the better way would be to have him meet Mr. Smith personally, and so we arranged to telegraph him next day, on the second, and Mr.

(Testimony of Cleve W. Van Dyke.)

Smith was in New York, and I did so telegraph, as I instructed my secretary to telegraph him to meet Mr. Parker in Chicago.

My stenographer, Miss Tanner, had worked for me some time. It was the custom when I dictated a letter for her to put my initials on a letter and follow my initials with her own. There were several people in our office and whoever she took a letter for, she put their initials on. I presume she put my initials "C W V", colon "T", her name, on this letter; I didn't look at it. I presume it was done by her. I presume she wrote the letter in my presence. That was the custom, showing that I dictated the letter. In the letter of May 21st, 1927, written from Long Beach in California, I stated "enclosed please find my check for Five Hundred Dollars as per our understanding." That understanding was not that I was to pay [170] him Five Hundred Dollars on the note by a certain time; the understanding was that I would pay him Two Thousand Dollars in full and complete settlement for my obligation with him, and that he would discount the note on that basis, as a final settlement. This is what was said on that point; he said "I know you are right about these notes being outlawed". I told him that my attorney had told me that again in Los Angeles, that the notes were outlawed, and he agreed with me. He said "yes, Van, those notes are outlawed". My attorney, Mr. Rawlins, told me that. I was taking another matter up with him, and after I saw Mr. Parker, I went down to see Mr. Raw-

(Testimony of Cleve W. Van Dyke.)

lins on another matter, a public utility matter. He didn't know at that time; I had no conversation then concerning the business deal. I made a courtesy call on Mr. Parker on the way down to meet Mr. Rawlins.

I would not say I have been a business man involving "large" enterprises, no. I own the electric light company in Miami. It is not a public utility; it was not incorporated; privately owned. It was a public utility serving electrical energy to the residents of Miami, Arizona.

> "Q. You have been dealing in several large ventures, haven't you, timber land transactions?"
>
> "A. I have had part in various enterprises, yes."

I have been in the public utilities business, and various other businesses. I have been in the state about twenty-one years.

> "Q. You have been interested in various timber lands and public utilities, and things of that kind?"
>
> "A. With the exception of timber lands. I held stock in a timber land company."

I had no written agreement in this settlement of outlawed paper for the sum of Two Thousand Dollars. I did not acquire a receipt of final discharge; I didn't think it was necessary. I was very much surprised when I found he had endorsed them.

[171]

(Testimony of Cleve W. Van Dyke.)

I believe I was elected on the Board of Directors of the Calhoun Timber Company.

"Q. You signed that agreement at the same time that you signed those notes as president of the Timber Company?"

"A. I will have to look at it first to refresh my memory."

"Q. All right."

"A. I didn't recall the instrument until I saw this. This is my signature, but I don't recall anything about it."

I don't recall the instrument at this time. I presume I did sign it. I know my own handwriting. I think that is my signature. I have no doubt about it; it looks to me like my signature. I signed it as president of the Calhoun Timber Company. I succeeded Mr. Parker in that position.

(Witness excused)

TESTIMONY OF L. D. VAN DYKE

L. D. Van Dyke, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct Examination

My name is L. D. Van Dyke. I live at 3719 Olive Street, Long Beach, California. I have lived in Miami for twenty years, up until late 1929. Cleve Van Dyke is my brother. I know Mr. Parker, the

(Testimony of L. D. Van Dyke.)

plaintiff in this action. I was in Miami in December 1926 and January 1927. I was in the employ of the Miami Trust Company and the Van Dyke Copper Company, and also assistant to by brother in his private affairs. I remember an occasion of driving Mr. Parker and my brother, the defendant, to Phoenix. My recollection is, it was on the day after New Years in 1927, the 2nd of January, that would be. Pardon [172] me, I think it was the 1st of January; on New Year's day. I went to Phoenix that day; it was Saturday, the first of January. We returned the same day. On the way down and back there was a discussion about business matters between my brother and Mr. Parker. I was in Los Angeles some time in April of 1927 when Mr. Parker and my brother, Cleve, was there. I went to Los Angeles about April 8th or 10th, 1927. I think Charles Rawlins was with me on the trip. I stayed there, I think, to the 16th of April. While I was there during this trip, I was present at the meetings between my brother, Cleve, the defendant in this action, and the plaintiff, Mr. Parker, except the first one, when he went up to the Woodward Hotel to see Mr. Parker. One of these conversations was held in the Woodward Hotel, located in the City of Los Angeles, on Eighth and Olive. One was at home in Long Beach, and one conversation riding in the car. I was present at the conversation that took place in the Woodward Hotel in Los Angeles.

At that time the plaintiff and the defendant in my presence discussed many other matters prior to

(Testimony of L. D. Van Dyke.)

mentioning the notes, and then it came down to a discussion of the notes, and my brother, C. W. Van Dyke, said "Mr. Parker, you know that those notes are outlawed and you have no legal action against the notes." He says "Yes, I realize that the are", and then Mr. Parker told my brother that he was very hard up; that he was in danger of losing his home. He was promoting some new irrigation company, and if he could get some assistance, he would be able to make sufficient funds from his new enterprise to take care of his business matters. My brother asked Mr. Parker how much he thought he had coming to him, and he told him he would be satisfied if he paid him, I think it was Two Thousand Dollars, and that not to apply on the notes, but to clean [173] up any moral obligations that might exist there, and they agreed to that settlement. As to how the payments were to be made, he would make Five Hundred Dollars cash or by check, and Five Hundred Dollars each thirty days until the completion of the agreement.

At the conversation at Long Beach Mr. Parker did most of the talking, as I remember it, about the payment plan, and my brother made a payment of Five Hundred Dollars, and they went for a ride. I don't remember anything pertaining to this business on the ride; casual conversation had between them. I have never seen Mr. Parker from that time until I saw him here in Tucson.

Cross Examination

My memory is that it was Saturday; New Years day was Saturday. I think it was quite early in the

(Testimony of L. D. Van Dyke.)
morning when we left Miami for Phoenix. It was dusk in the evening when we left Phoenix to return to Miami. Mr. Parker objected to riding in the evening, and we assured him it was safe. It was along about ten o'clock or nine o'clock in the morning when we left for Phoenix, that is my best memory.

I think this letter that was written in the office was written while I was getting the car ready to go. I do not recall that situation, I am not familiar with the letter. I never saw it. On the trip to Phoenix I heard them discuss this business matter. I don't recollect them discussing the letter. On the way back from Phoenix, I heard them discussing the plan. I don't remember that I heard that letter mentioned. I was with my brother and Mr. Parker part of the time. I did not hear anything said about this letter in Phoenix by Mr. Van Dyke, my brother, or Mr. Parker. I can't say what this particular letter was. I never saw the letter dated January 1, 1927, [174] Exhibit 4, so I don't know what it is. While we were in Phoenix, my recollection is that we had a room in the Adams Hotel while we were there, in which my brother and Mr. Parker had conferences, and I did some other small business. I called upon the farm we had out there, a farm we owned at the time, making some plans. We went out to the farm on the way home. I have forgotten now what we went to Phoenix for, we made so many trips to Phoenix in those days. This particular trip on New Years day had something to do with our farm that we had there. I know my brother

(Testimony of L. D. Van Dyke.)

had some business there, but I have forgotten what it was, but I was the driver of the car at the time. I don't know what the business was; I was not present all of the time when he was transacting his affairs. I think it was late in the evening when we returned to Miami; just as the sun began to go down. When we returned to Miami, that is the last time I saw Mr. Parker; I don't know where he went from there. To get out of Miami at that time, in 1927, he could take the Southern Pacific Railroad Company to Bowie or to Phoenix, but he could take the stage out and he could go from Miami to Globe. He could have left Phoenix on the Southern Pacific without returning to Miami. I did not see them after they returned to Miami that I know of; no business transaction; they returned late in the evening. That is the last I saw of him. I saw him, of course, in April in Los Angeles. At that particular meeting that is the last I saw him.

It was after dark when we returned. We left there along about five o'clock, five-thirty maybe, and we got in there about eight-thirty or nine at night. I do not know of anyone that my brother or he and my brother together saw in Phoenix on that day; I had further work to do. I remember that I was buying some supplies and things, and I was not with them all the time. I don't remember what place I visited; we arranged for seed and things of that kind. [175] It was on New Years day. Some of those places were open; I can't give you the detail. As I remember I made a call upon some feed company over there. I believe it was the Greenlief Company that I visited.

(Testimony of **L. D. Van Dyke.**)

I met my brother and Mr. Parker at the Woodward Hotel in Los Angeles the first time in the morning. My brother went up to see Mr. Parker from Long Beach. I believe my brother was in Long Beach then being treated, if I remember. His home was in Miami, and he was there temporarily. He did not own a home there and house at that time. I believe he was in some apartment house, Blackstone Apartments. During the summer he was in and out of Los Angeles for several months. I don't believe Mrs. Van Dyke was with him on that particular time. Intermittently she was up there. They did not build a garage for a home over there; the garage was nothing for the home; he had a little apartment.

> "Q. A little apartment of sixteen or seventeen rooms?"
>
> "A. No, I think he had three or four rooms over the garage, and he kept his car down below at the back end of the building."

He built it by day labor. He had the home constructed. He lived there over a period of several months intermittently.

Going back to the Woodward Hotel, I think Mr. Parker opened up the conversation about these notes. He wanted to know what my brother was going to do about it. The exact words, of course I can't remember. I know the gist of his talk. In substance he said "Van, I want to discuss those notes." The notes had been sent out to the bank,

(Testimony of L. D. Van Dyke.)

as I remember, and Van, my brother, only told him "Parker, those notes are outlawed." "Yes, I know they are." That was in April, 1927. Mr. Parker then said "Yes, I know they are outlawed, but I might have brought suit when they were not outlawed", and Cleve said [176] "yes", and he said "I think I should have some consideration coming, moral obligation". Then my brother said "What do you consider the amount of consideration that you should have to clean up this obligation", and he said "about Two Thousand Dollars", and the agreement was made at that time. They had lots of other conversations, but not pertaining to this business. That is the gist of the conversation. Because it was outlawed, my brother agreed to pay him Two Thousand Dollars and satisfy any moral obligation that might be there. That is all I remember about it.

The next day they went out to where my brother was temporarily living. They still continued their conversation along the same lines, and discussed it in a general way. They went over the same ground as I have testified to. They came to a conclusion, as I remember it, and my brother paid him a check.

Up at the Woodward Hotel they came to an agreement. Down at the house they discussed it again, not the same detail, but the same general statements, about the outlawing of the notes, the release of the moral obligations, and payment of the Five Hundred Dollars. My remembrance is that my brother gave Mr. Parker a check at that time for Five Hundred Dollars. I believe it was in the afternoon, shortly after lunch; mid-dinner.

(Testimony of L. D. Van Dyke.)

Redirect Examination

I made a memorandum of exactly what was said at that conversation. I have the memorandum with me in my pocket.

(Thereupon the witness produces a document from his pocket, and hands to the examining attorney).

I made that at the time; that is the first conversation at the Woodward Hotel that I heard. At the Woodward Hotel Parker said that if the Two Thousand Dollars was paid, he would have no further obligation against Mr. Van Dyke. [177]

Re-Cross Examination

I did remember that when you asked me a while ago. You didn't ask me to testify to it. There was a lot said. It didn't occur to me to state that, because you didn't ask me. It didn't occur to me to tell you that that was a part of the things that were said.

"Q. I didn't ask you that, I didn't know such a thing was said."

"A. It was though."

(Witness excused).

TESTIMONY OF HOVAL A. SMITH.

Hoval A. Smith, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

(Testimony of Hoval A. Smith.)

Direct Examination

My name is Hoval A. Smith. I live in Warren, Arizona. I have lived in Warren and the Warren District for nearly thirty-five years. I know the plaintiff, Mr. Parker, and have known him for a little over nineteen years. I know Mr. Van Dyke, the defendant, and have known him for thirty-nine years.

On the 1st day of January, 1927, when I was in New York I got a telegraph from Mr. Van Dyke. In pursuance of that telegram, about two weeks later I met Mr. Parker in Chicago, at the La Salle Hotel. This meeting in Chicago was previously arranged between Mr. Parker and myself. Pursuant to that arrangement I wired him when I would be at the La Salle Hotel in Chicago. I went there and met Mr. Parker there on the afternoon of January 15, 1927. We did not discuss the contents of this letter in this suit. We never discussed the contents of [178] that letter that he had at any time. I have not seen Mr. Parker from that day until I saw him here in Tucson. I have never received a copy, or the original of this letter that is marked Exhibit 4 in evidence. At about that time, or sometime in January, I had my mail go to Washington. I received mail at Senator Cameron's office at that time, about the 13th of January. He also forwarded considerable mail to me at the Commodore Hotel in New York. When I went to Senator Cameron's office in Washington, I got the mail addressed to me in his care, and there received mail. A copy or the

(Testimony of Bascom Parker.)
original of this letter was not there; I never received it.

(Witness excused).

(Thereupon defendant rested).

At this point defendant moved for judgment in his favor in the following language:

"Mr. CHARLES RAWLINS: We move the Court to find for the defendant upon all of the facts, for the reason that plaintiff has wholly failed to establish his cause of action; wholly failed to prove that the cause of action is not barred by the statute of limitations pled in our answer, and wholly failed to prove that the defendant ever signed any instrument in writing acknowledging the justness of the debt or that he would pay it, at any time since the date of the note."

"The COURT: I will not rule on that motion until all the testimony is in."

"Mr. CHARLES RAWLINS: And give us an exception in the record."

"The COURT: Yes." [179]

TESTIMONY OF BASCOM PARKER
(In Rebuttal)

Plaintiff, Bascom Parker, being called as a witness in his own behalf in rebuttal, and having been duly sworn according to law, testified as follows:

(Testimony of Bascom Parker.)

Direct Examination

I heard the testimony of Mr. Van Dyke regarding my meeting him at the Woodworth Hotel in Los Angeles about the middle of April, 1927. I had no such conversation with Mr. Van Dyke regarding any proposal of settlement of the notes by the payment of Two Thousand Dollars at the rate of Five Hundred Dollars a month, that he testified to. I made Mr. Van Dyke come to the Woodward Hotel. The day after I got there, and he said he was busy and could not see me that day. The next day Mr. Van Dyke come and got me in his automobile and drove me out to his home at 4020 Lucus Avenue, Long Beach. Mr. Van Dyke was with me on this trip, and no one else was present. His brother was not present as he testified. He drove me out to his house and I met his wife. I knew his wife, and I met his daughter. They were living there to all appearances, and I asked him why he built such a home, and he says "you know, Parker, we have earthquakes out here." I made up my mind that he built wisely. We sat there a little while, and he got his daughter and put her in the car and drove; she says to Pasadena, but I didn't know whether I was in Pasadena or where I was, but we drove to this school, and he brought me back then around over to the ocean, and down through Long Beach, and then over to the oil fields, Sentinel Hill, and back to the hotel.

"Q. During that drive that time, was there anything said between you as to those notes?"

"A. No." [180]

(Testimony of Bascom Parker.)
It was just a friendly ride. Up to that time nothing had been said by me or him concerning those notes.

Mr. Van Dyke came back on that next day and came to the Woodward Hotel, and we went up to my room. There wasn't anybody in the room but Mr. Van Dyke and myself, and I told him I needed money and I needed it bad and I wanted him to help me. I wanted some money, and he says "Parker, I haven't got any money". "Well", I said, "couldn't you give me money enough to let me go through with some promotion work that I am on; I am hard up, practically broke", and he says "how much will it take?", and I says "Two Thousand or Twenty-five Hundred Dollars". "Well," he says "I haven't got that much money, but I will tell you what I will do, I will give you a check now for Five Hundred Dollars and I will send you a check each thirty days to make the Two Thousand Dollars." He gave me a check, and I went down to the lobby and checked out and took the train for home.

Not one word was said by Mr. Van Dyke or myself about those notes being outlawed. He could not have said they were outlawed, because that was in April, and the ten years limit on the notes would not have been up on the notes until October 30th, of that year; that same year. That is the reason I went out there, because I didn't know they were outlawed. I absolutely did not make any agreement with him to release him or relieve him from liability on those notes on the payment to me of Two Thou-

(Testimony of Bascom Parker.)

sand Dollars. I absolutely did not release his liability for Two Thousand Dollars.

I heard Mr. Hoval A. Smith testify. I heard his testimony concerning his meeting me in Chicago at the La Salle Hotel in Chicago, the forepart of 1927. I did not meet Mr. Smith in Chicago at that time. I did not meet him any time near that date. I did not meet him in that year, not in Chicago. [181] I met Hoval Smith, I was going to St. Ansgar to see Bob Lubiens.

> "The COURT: Did you meet Mr. Smith in Chicago sometime in January?"
>
> "The WITNESS: I said no."

I did not make that trip to Phoenix on January 1, 1927 that Mr. Van Dyke and his brother testified to.

When I left Miami for home, I left on the bus. It was about seven o'clock, on the corner of a little cigar store. I stopped in there to buy some cigars. It was January 1, 1927, I rode in the bus, seven miles over to Globe, and there I got a Pullman for Chicago. Got my ticket.

I went to Phoenix with Mr. Van Dyke. I got in there, I think—I am pretty sure I arrived in Miami on the night of the 28th of December, and I call Mr. Van Dyke on the phone, and he was to see me the next morning at his office, and I went to his office, and while there, somebody came in and delivered some message to him, and he said "Parker, I have got to go to Phoenix." He told Pat to get the car ready, "will you ride over to Phoenix with

(Testimony of Bascom Parker.)

me", and I said "yes", and we went to Phoenix. We got in Phoenix along the middle of the afternoon and stayed there that day and that night, and we left Phoenix the second day in the evening. It was just dusk, and we got back to Miami on December 31st about ten or eleven o'clock at night. I know I wanted something to eat, and I wanted them to go into the restaurant with me, and they said "no".

The letter was written after I returned from Phoenix, the next morning, January 1st. Not a word was said between myself and Mr. Van Dyke as to doing away with that letter and superseding it. That letter was handed to me by Mr. Van Dyke himself. When he handed it to me, he says "Parker, there is a copy", and just handed it to me. I did not dictate any of that letter, not a line, not a word, not even suggested anything. [182]

I had no conversation whatever in California in April 1927, or any time, with Mr. Van Dyke concerning the settlement of his moral obligation to me. I heard the statement, the testimony of my statement to him that I knew the notes were outlawed, and that on account of past performance on my part, I considered that he had a moral obligation to me. That is not true. I never had any agreement with him, or ever discussed with him any question as to his liability to pay only one of those notes. I had no conversation whatever with him that he should be liable for the payment of only one of the notes and Mr. Smith the other.

(Testimony of Bascom Parker.)

"Q. And Mr. Lubiens the other?"

"A. No sir, they bought me out and gave me those notes, and I considered——"

"The COURT: Just answer the question."

"Q. The notes were given to you for what?"

"A. Payment for stock. They gave me some bonds, and they gave me some cash, and they gave me these three notes."

Mr. Van Dyke and Hoval A. Smith gave me these three notes. That was stock in the Calhoun Timber Company, in Calhoun County, Florida. I have not talked with Mr. Van Dyke since he left the Woodward Hotel. The first time I saw him was here. It is true that I testified that Mr. Van Dyke agreed to pay me Five Hundred Dollars a month at that time until he had paid me Two Thousand Dollars on the Twenty-five Hundred Dollars at the time I asked him for money in Los Angeles. I did not understand from those letter, Plaintiff's Exhibits 1, 2 and 3, dated respectively May 21, 1927, June 13, 1927 and July 15, 1927 that Mr. Van Dyke was paying off his liability in full to me. There was no such agreement whatever to that effect.

Cross-Examination.

After this last payment from Mr. Van Dyke in July, 1927, [183] I never made any demand upon him to make any other payments on those notes; at no time.

(Testimony of Bascom Parker.)

Re-direct Examination.

I have been asked as to whether I made a demand on Mr. Van Dyke for further payment after the payments evidenced by the letters. The reason I did not make demands on Mr. Van Dyke for further payments, is that Mr. Van Dyke and I have always been personal friends, and I regarded him as a high class gentleman, and I had gotten over the rocks, and was waiting for things to be better fixed, and I had no desire at that time to press further on it. That is the truth.

Re-Cross Examination,

"Q. Why did you then put it in the hands of Mr. Foster to demand payment?"

"A. Because the time had gone on and I was needing money then, and I didn't have the money to keep going back to California for a Thousand Dollars or Five Hundred Dollars."

"Q. If you were such a good friend of Mr. Van Dyke, you didn't ask him for any further payments though?"

"A. That is absolutely true."

"Mr. CHARLES RAWLINS: That is all."

"Judge DARNELL: Q. If Mr. Van Dyke had been a stranger?"

"The WITNESS: If Mr. Van Dyke had been a stranger, I would have sued him right away."

(Witness excused.)

"The COURT: Any further testimony, gentlemen?"

"Judge DARNELL: None."

"Mr. CHARLES RAWLINS: None on the part of the defendant, except we now renew our motion." [184]

"The COURT: Let the record show the same motion as at the time of the close of plaintiff's case."

"Mr. CHARLES RAWLINS: I will ask the Court to make findings of fact and conclusions of law."

The proceedings and testimony having been completed on the 3rd day of June, 1933, the case was thereupon submitted to the Court and taken under advisement; counsel to file briefs.

On Sept. 15, 1934 the Court overruled defendant's objection to admission of plaintiffs Exhibit 4 and granted exception to defendants.

Special Findings of Fact and Conclusions of law were entered on the 22nd day of November, 1934. The Judgment, from which this appeal was taken was made and entered on the 22nd day of November, 1934. Motion for New Trial thereon was served upon the plaintiff on the 30th day of November, 1934, and filed in this Court on that date. The same was argued before the Court on the 20th day of December, 1934, and on that date

the Court took the motion under consideration, and on the 12th day of February, 1935, denied the motion for new trial.

(Said Motion for New Trial being in accordance with Rules of Practice No. 37, of the District Court of Arizona, applicable portions of which are as follows:

> "A motion for new trial or petition for rehearing served and filed under this rule shall be deemed to be entertained by the court and shall suspend the operation of the judgment or decree and of any and all process that may have been issued thereon, and of any appeal which may have been granted, and thereafter no appeal will be granted from said judgment or decree, or any process issued for the enforcement thereof, until final disposition of said motion or petition.")

Stipulation Extending Time to File and Settle Bill of Exceptions and Docket Appeal was entered and filed on the 25th day of February, 1935, and is in words and figures as follows: (omitting title)

[185]

> "IT IS STIPULATED by and between the parties to the above entitled and numbered action, through their undersigned attorneys, that an order may be entered by the Court extending the time of the defendant, Cleve W. Van Dyke, within which to prepare draft of Bill of Exceptions, serve and file same, and

have same settled, allowed and approved, up to and including the 1st day of May, 1935.

"IT IS FURTHER STIPULATED that the time for docketing the appeal in the above entitled and numbered cause may be by order of the Court extended to and including the 1st day of May, 1935."

In compliance with said stipulation, the Court on the 25th day of February, 1935, made the following Order Extending Time for Preparation and Filing, etc. of Bill of Exceptions: (omitting title)

"IT IS HEREBY ORDERED that the time within which Cleve W. Van Dyke may prepare draft of Bill of Exceptions, serve and file same and obtain settlement, allowance or approval thereof, be and the same is hereby extended to and including the 1st day of May, 1935.

Done in open Court this 25th day of February, 1935."

And on said 25th day of February, 1935, the Court also made the following Order Extending Time to Docket Appeal: (omitting title)

"PURSUANT to stipulation heretofore filed in this cause,

IT IS HEREBY ORDERED that the time for docketing the appeal in the above entitled and numbered cause be, and the same is hereby extended to and including the 1st day of May, 1935.

"Done in open Court this 25th day of February, 1935."

Thereafter Stipulation extending Time for Presentation, Settlement and Allowance or Approval of Bill of Exceptions, for Docketing Appeal, and extending November 1934 Term of Court, was entered into and filed on the 22nd day of April, 1935, and is in the words and figures following: (omitting title) [186]

"IT IS STIPULATED by and between Bascom Parker, plaintiff and appellee, and Cleve W. Van Dyke, defendant and appellant, acting by their undersigned attorneys, that an order may be entered in the above entitled matter, extending the time for presentation, settlement, and allowance or approval of the bill of exceptions, for docketing the appeal, and extending the November 1934 Term of the Court, up to and including the 1st day of June, 1935.

"Dated this 22nd day of April, 1935."

In compliance with said stipulation, the Court on the 22nd day of April, 1935, made the following Order Extending November 1934 Term of Federal Court: (omitting title)

"It is hereby ordered that the November 1934 term of this District Court for the District of Arizona, be and the same is hereby extended to and including the 1st day of June, 1935, for the purpose of preparing and filing, settle-

ment, allowance or approval of bill of exceptions, and for the purpose of making any and all motions, and of taking any action which must be made or taken within the November 1934 term of the Court, in reference to the judgment in the above entitled action.

"Done in open Court this 22nd day of April, 1935."

The Court also on said 22nd day of April, 1935, made the following Order Extending Time for Docketing Appeal:

"It is hereby ordered that the time for docketing the appeal in the above entitled and numbered cause, be and the same is hereby extended to and including the 1st day of June, 1935.

"Done in open Court this 22nd day of April, 1935."

And also the Court made on said 22nd day of April, 1935, the following Order Extending Time for Presentation, Settlement and Allowance or Approval of Bill of Exceptions:

"It is hereby ordered that the time within which the defendant Cleve W. Van Dyke may obtain settlement, and allowance or approval of the bill of exceptions in the above entitled cause be and the same is hereby extended to and including the 1st day of June, 1935.

"Done in open Court this 22nd day of April, 1935." [187]

On November 10, 1934, it was stipulated in open court by and between plaintiff and defendant Van Dyke that the answer of defendant Van Dyke should have the same effect as if the same were verified, and on said stipulation being entered into the Court denied defendant's motion to file verification to answer. [188]

FORASMUCH, as the matters above set forth do not fully appear of record, and in furtherance of justice and that right may be done, the defendant Cleve W. Van Dyke tenders and presents the foregoing as his Bill of Exceptions in this cause, and prays that the same may be settled and allowed, and signed and approved by the Judge of this Court, and made a part of the record in this cause.

Dated this 22nd day of April, 1935.

CHARLES L. RAWLINS
GEORGE H. RAWLINS
THOMAS W. NEALON
Attorneys for Defendant-Appellant
Cleve W. Van Dyke. [189]

CERTIFICATE AND ORDER

THE FOREGOING BILL OF EXCEPTIONS was lodged on the 25th day of May, 1935, within the time allowed for the filing of Bill of Exceptions by orders of the United States District Court for the District of Arizona, dated February 25, 1935, and April 22, 1935, fixing and extending the time within which the Bill of Exceptions is to be settled and filed with this Court as of June 1, 1935, which is within the term at which said judgment became final, and within the extended term of this court made by order duly entered and filed in the office of the Clerk of the United States Court, and which having been seen and examined by the Court and Counsel, and as it contains all of the evidence introduced in this case and correctly shows the proceedings had, and is correct in all respects, and is a true and complete Bill of Exceptions, IT IS HEREBY APPROVED AND ALLOWED, and made a part of the record herein.

It appearing to the Court that either or both of the parties desire that certain testimony of witnesses, as the same appears in the foregoing Bill of Exceptions be in the exact words of the witnesses, and it appearing necessary to a clear understanding of such testimony, IT IS HEREBY DIRECTED that the same so appear and the insertion thereof in the Bill of Exceptions is approved; and the said Bill of Exceptions is ordered by said Court to be filed and made a part of the record herein, which is now accordingly done.

Dated at Tucson, Arizona, this 25th day of May, 1935.

ALBERT M. SAMES
Judge of the United States
District Court. [190]

[Endorsed]: Service of the within Bill of Exceptions acknowledged this 22nd day of April, 1935.

GEORGE R. DARNELL
SAMUEL L. PATTEE
LAWRENCE V. ROBERTSON
Attorneys for Plaintiff.

[Endorsed]: Deft's. Proposed Bill of Exceptions. Filed Apr. 22, 1935.

[Endorsed]: Bill of Exceptions. Filed May 25, 1935. [191]

[Title of Court.]

May 1935 Term At Tucson

MINUTE ENTRY OF MAY 13, 1935.
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Cause.]

ORDER STRIKING PROPOSED BILL OF EXCEPTIONS FROM CALENDAR.

This being the time heretofore fixed for the settlement and allowance of the Bill of Exceptions heretofore filed by the defendant Cleve W. Van

Dyke, and no counsel being present for the parties herein,

IT IS ORDERED that the proposed Bill of Exceptions of said defendant be stricken from the calendar to be reinstated upon application of counsel. [192]

[Title of Court.]

May 1935 Term At Tucson

MINUTE ENTRY OF MAY 25, 1935
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Cause.]

ORDER SETTLING, ALLOWING AND APPROVING BILL OF EXCEPTIONS.

Samuel L. Pattee, Esquire, appears as counsel for the Plaintiff. Thomas W. Nealon, Esquire, appears as counsel for the Defendant Cleve W. Van Dyke.

Upon stipulation of the respective counsel,

IT IS ORDERED that said counsel be allowed to withdraw pages 5, 44, and 54 of said Defendant's Proposed Bill of Exceptions and insert in lieu thereof pages now tendered and numbered identically therewith, and that said counsel be allowed to insert page 68½ following page 68 of said Proposed Bill of Exceptions, which is accordingly done.

Whereupon, said counsel now stipulate that said Proposed Bill of Exceptions may be settled, ap-

proved and allowed, and it appearing to the Court that the time provided by law for settlement and allowance thereof, and the term within which the trial of this case was had, have not expired,

IT IS ORDERED that said Bill of Exceptions of the Defendant Cleve W. Van Dyke be and the same is hereby settled, allowed and approved. [193]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Albert M. Sames, United States District Judge for the District of Arizona:

CLEVE W. VAN DYKE, one of the defendants in the above entitled cause, conceiving himself aggrieved by the judgment entered against him in said cause on the 22nd day of November, 1934, (motion for new trial having been filed and served upon the plaintiff on the 30th day of November, 1934, and denied by said Court on the 12th day of February, 1935), by which said judgment it is Ordered, Adjudged and Decreed that the plaintiff Bascom Parker do have and recover of the defendant Cleve W. Van Dyke the principal sum of Eight Thousand and no/100 Dollars ($8,000.00), together with interest in accordance with the terms of the promissory notes set forth in plaintiff's Second Amended Complaint herein, amounting in all, both principal and interest, at the date of said judgment to the sum of Eighteen Thousand Seven Hundred Sixty-Seven and 68/100 Dollars ($18,767.68); and that

said principal sum of Eight Thousand and no/100 Dollars ($8,000.00) bear interest from the date of said judgment until paid at the rate of seven per cent per annum; and that the plaintiff Bascom Parker have and recover from the defendant Cleve W. Van Dyke the further sum of Two Thousand and no/100 Dollars ($2,000.00), attorneys' fees in said action, together with the costs of said [194] action, taxed at the sum of Two Hundred Nine and 55/100 Dollars ($209.55), (a demurrer on behalf of defendant Hoval A. Smith having theretofore been sustained and the case dismissed as to him), does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, from said judgment and files herewith an Assignment of Errors, and prays that this appeal be allowed for the reasons specified therein, and that citation upon appeal issue as provided by law, and an order made fixing the amount of bond on appeal, and that upon said Cleve W. Van Dyke giving said bond on appeal, conditioned as required by law, the same shall operate as a cost bond.

Dated at Phoenix, Arizona, this 22nd day of April, 1935.

CHARLES L. RAWLINS,
Charles L. Rawlins,
GEORGE H. RAWLINS,
George H. Rawlins,
THOMAS W. NEALON,
Thomas W. Nealon,
Attorneys for Defendant
Cleve W. Van Dyke.

SERVICE of copy of the above and foregoing petition for appeal is admitted this 22nd day of April, 1935.

GEORGE R. DARNELL
SAMUEL L. PATTEE
Darnell and Nave.
L. V. ROBERTSON
S. L. Pattee,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 22, 1935. [195]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

COMES NOW CLEVE W. VAN DYKE, the defendant-appellant in the above entitled cause, and in connection with his appeal avers that in the records, proceedings and judgment manifest errors occurred, and he, therefore, makes the following assignment of errors as having so occurred upon the trial of said cause, or were committed by the Court prior to said trial or in the rendition of judgment therein;

I.

The Court erred in overruling the demurrer of the defendant appellant to the first cause of action set up in the first and second amended complaint of the plaintiff filed herein, for the reason that it appears therein that said cause of action accrued on the 30th day of December, 1918, upon the maturing of the promissory note set up in said first

amended and second amended complaints, which said promissory note being a written instrument made and payable without the State of Arizona, and said action being commenced and prosecuted more than four years after this cause of action accrued upon a written instrument executed without the State of Arizona; and the said cause of actions so appearing in said pleading being barred by the statute of limitations of the State of Arizona, as contained in Subdivision 3, Section 2061 of the 1928 Civil Code of Arizona, which [196] provides that such actions shall be commenced within four years after the cause of action shall have accrued and not afterwards; and the laws of Arizona and the decision of the Supreme Court of the State of Arizona further providing that the defense of the statute of limitations may be set up by demurrer, and when so set up defendant is entitled to judgment in his favor.

II.

The Court erred in overruling the demurrer of the defendant appellant to the second cause of action set up in the first and second amended complaint of the plaintiff filed herein, for the reason that it appears therein that said cause of action accrued on the 30th day of June, 1919, upon the maturing of the promissory note set up in said first amended and second amended complaints, which said promissory note being a written instrument made and payable without the State of Arizona, and said action being commenced and prosecuted more than four years after this cause of action accrued upon a written instrument executed without the State of

Arizona; and the said cause of action so appearing in said pleading being barred by the statute of limitations of the State of Arizona, as contained in Subdivision 3, Section 2061 of the 1928 Civil Code of Arizona, which provides that such actions shall be commenced within four years after the cause of action shall have accrued and not afterwards; and the laws of Arizona and the decision of the Supreme Court of the State of Arizona further providing that the defense of the statute of limitations may be set up by demurrer, and when so set up defendant is entitled to judgment in his favor.

III.

That the Court erred in denying the motion of defendant appellant, defendant appellant having excepted to the denial of said motion, made at the conclusion of the plaintiff's case for judgment in behalf of defendant, made upon the ground that there [197] was no sufficient, substantial or competent evidence to sustain a judgment for the plaintiff in the case nor any evidence to sustain a judgment for the plaintiff in the case, and that defendant was entitled to judgment in his favor for the reason that the uncontradicted evidence showed that any cause of action that the plaintiff might have had against the defendant was barred by the statute of limitations of the State of Arizona, as conained in Subdivision 3, Section 2061 of the 1928 Civil Code of Arizona, which defense was set up by the defendant appellant, both in his demurrers and in his answer to the merits of plaintiff's complaint; and for the further reason that there was

no evidence to show that the plaintiff was the owner and holder of the notes sued on in the plaintiff's first amended and second amended complaint at the time the action was brought, or at the time that the judgment was rendered herein. Said motion being upon the specific grounds that the Court should find for the defendant upon all of the facts for the reason that plaintiff has wholly failed to establish his cause of action, and wholly failed to prove that the cause of action is not barred by the statute of limitations of the State of Arizona pleaded in the demurrer and answer of the defendant appellant, and has wholly failed to prove that the defendant ever signed any instrument in writing acknowledging the justness of the debt or promised to pay the same at any time since the date of the note.

IV.

That the Court erred in denying the motion of defendant appellant, defendant appellant having excepted to the denial of said motion, made at the close of the testimony of the case for judgment in behalf of defendant, made upon the ground that there was no sufficient, substantial or competent evidence to sustain a judgment for the plaintiff in the case nor any evidence to sustain a judgment for the plaintiff in the case, and that defendant was entitled to judgment in his favor for the [198] reason that the uncontradicted evidence showed that any cause of action that the plaintiff might have had

against the defendant was barred by the statute of limitations of the State of Arizona, as contained in Subdivision 3, Section 2061 of the 1928 Civil Code of Arizona, which defense was set up by the defendant appellant, both in his demurrers and in his answer to the merits of plaintiff's complaint; and for the further reason that there was no evidence to show that the plaintiff was the owner and holder of the notes sued on in the plaintiff's first amended and second amended complaint at the time the action was brought, or at the time that the judgment was rendered herein. Said motion being upon the specific grounds that the Court should find for the defendant upon all of the facts for the reason that plaintiff has wholly failed to establish his cause of action, and wholly failed to prove that the cause of action is not barred by the statute of limitations of the State of Arizona pleaded in the demurrer and answer of the defendant appellant, and has wholly failed to prove that the defendant ever signed any instrument in writing acknowledging the justness of the debt or promised to pay the same at any time since the date of the note.

V.

That the Court erred in admitting in evidence in behalf of the defendant appellant plaintiff's Exhibit Number 4 over the objection and exception of the defendant, said Exhibit being a document which appears in the photostatic copy herein produced, and is in words and figures as follows, to wit: [199]

January 1,1927

Mr. Hoval A. Smith,
Care Senator Ralph H. Cameron,
Senate Office Building,
Washington, D. C.

My dear Hoval:

Mr. Bascom Parker, of Niles, Michigan, arrived in Miami a few days ago asking the settlement of two notes of $5,000 each, given to him in Chicago August 30, 1917, in payment for his stock in the Calhoun Timber Company. You will recall the deal.

This stock was purchased for the remaining stockholders of the company at the request of Mr. H. C. Olcott, acting for the trustees of the bondholders of the Calhoun Timber Company. The amount to be paid for this stock was $50,000; $25,000 of which was to be in Calhoun Timber Company bonds which were owned by the Calhoun Timber Company, and $10,000 in cash, and $15,000 in three $5,000 notes. These notes were to be the joint obligation of yourself, Mr. Lubiens and myself. The cash paid to Mr. Parker was a check against the $100,000 fund in the St. Ansgar Bank which we had borrowed from Thomas F. Cole, of New York. These notes were to have been paid when due. One of them came due in the following June and was sent out to me to Miami for collection. I paid this note. The two other notes have never been paid and form the basis of a demand on the part of Mr. Parker for payment at this time.

The stock was delivered and was transferred on the books of the company. One third of the stock was delivered to yourself, one third to H. C. Lubiens, and one third to myself. After the company became defunct the $100,000 owed to Thomas F. Cole became due and as you know I have paid this sum, so that puts me now in the position of having paid $15,000 of the $25,000 that was owing to Mr. Parker. After the first note was paid the other two notes were taken over by the St. Ansgar Bank, through Lubiens. Later on one of them was sent to me for collection by the St. Ansgar Bank. I refused to pay the same at the time because I had already paid the share due from me and later I paid a further sum of $10,000 which was the original cash paid to Mr. Parker.

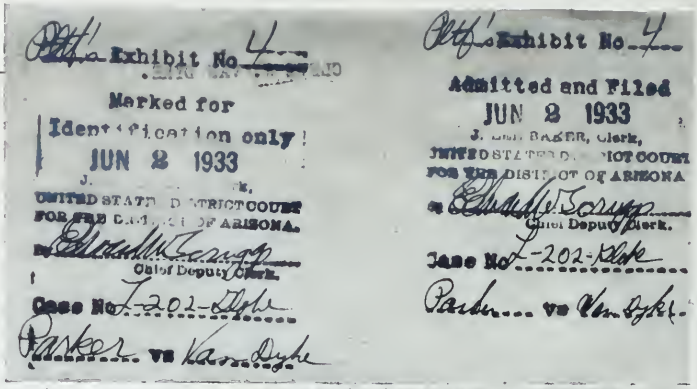
The notes were returned to the St. Ansgar Bank from the Gila Valley Bank of Miami, the bank to whom they were sent for collection. The refusal was based upon the grounds that I did not owe the money, that the stock had been turned over to Mr. Lubiens and that he owed the money for the amount due, as I had paid my share in full.

Later on there were some differences between the St. Ansgar Bank on this Calhoun Timber Company matter and yourself and myself. Mr. Lubiens, who was the treasurer of the company, and who was mutually trusted by us at t e time, had gathered together a lot of notes which he had placed in the bank and which had been signed by us at various times, and for which we had received no consideration and for which the Calhoun Timber Company had received no consideration. In my opinion at the time this matter was brought to my attention by you and by Mr. Salisbury, the whole matter was a fraud and that the bank could not hold me for any amount.

Time went on and at your insistence an agreement was reached between ourselves and the St. Ansgar Bank.In order to avoid litigation we agreed to a settlement between the bank and ourselves with the understanding that all notes and obligations were to be included within this settlement. No notice has ever been received by me from the Bank of St. Ansgar or Mr. Lubiens that they had not taken up these notes when they were refused payment by me for the cause stated above. I was under the impression that Mr. Lubiens and the bank, having been notified by me that it was their obligation, had assumed these notes and that they were still held by them and was part of the consideration upon which our settlement was based. What was my surprise to learn the other day upon the arrival of Mr. Parker that the bank, instead of including these notes in our settlement as I presumed was being done, had returned the notes to Mr. Parker unpaid. And now Mr. Parker has presented these notes to me for payment.

Now, Hoval, I have tried to be patient in this matter, I have tried to be fair; I have assumed more than my share of the obligation of this disasterous enterprise; I have carried the load for you; I have carried the load for the bank and have paid out practically all the cash money that has been paid out since the final crash of the company. I have secured not one nickle or one dime in salvage from the company and I have even gone so far as to pay the $100,000 to Mr. Cole which was a joint obligation of yourself, the bank and myself.

I presumed the bank was trying to adjust this thing fairly and on a basis of equity and trying to clear up a nasty mess. When Mr. Parker arrived I explained to him fully what my relationship to the bank was on these matters. I told him that we now have due and payable a note to them of $10,000. He has notified me that



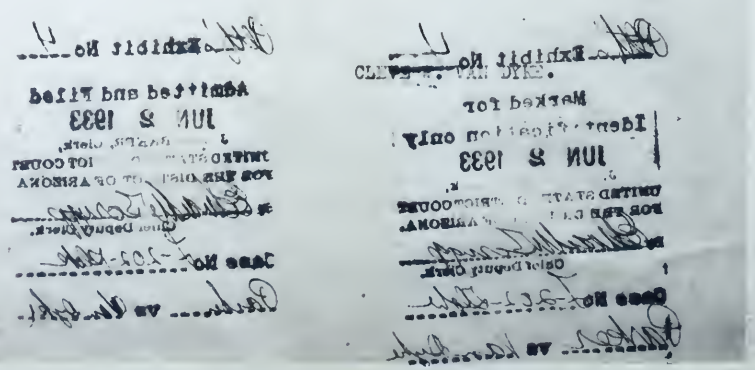
we must not make this payment to the bank until his matter is adjusted.

I am writing you to inform you of the situation. I request now that you feel obligated to Mr. Parker to fulfill my statement to him that we will not pay this note to the Bank of St. Ansgar until the matter is adjusted, in other words, I request that you, upon your return to Arizona, stop at St. Ansgar, see Mr. Salisbury and present this matter to him. Mr. Parker would have levied upon this payment that we were about to make to the Bank of St. Ansgar had I not stipulated to him as stated above. I suggest that you now have a definite understanding with Mr. Salisbury in reference to this matter. I expect them to treat Mr. Parker as fairly as I have treated them. Our agreement among ourselves was well understood and Mr. Parker is only asking for his rights and what is legitimate. The fact of the matter is I am very much surprised indeed at the action taken by the bank in this matter, especially after the settlement that has been made between them and us. We were trying to seek a way out of our difficulties and the way out unloaded over a quarter of a million dollars of obligations upon myself, which, while it is unfair, was arranged in order to avoid troublesome litigation and a long period of contest and fighting. As you know, we discussed the matter and we decided that it would take a large sum of money and a long time to work out this litigation. My health was poor, your affairs were involved, times were hard and we felt that we might better make an amicable settlement rather than seek our rues in the court. It may be that Mr. Salisbury does not know about this situation, and if he does not, you should apprise him of it and clarify it as soon as possible.

With kindest personal regards, I am

Yours very truly,

CWV:T



That said instrument as herein set up not being such an acknowledgment of the debt sued upon as would relieve the bar of the statute of limitations, as pleaded by the defendant, and not being sufficient under the provisions of Section 2068 Revised Code of Arizona 1928, which provides that when an action is barred by limitation no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law unless such acknowledgment be in writing and signed by the party to be charged thereby.

VI.

That the Court erred in admitting in evidence in behalf of the plaintiff, over the objection and exception of the defendant, the copy of note set up on page 2 of plaintiff's second amended complaint, the same being read into the evidence from the complaint and being in words and figures as follows:

"$5,000.00 Chicago, Illinois, October 20, 1917.

On or before December 30, 1918, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker, at The St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.

"It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

"The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

(Sgd) HOVAL A. SMITH
CLEVE W. VAN DYKE

No. 23716
P. O. Miami, Ariz.
and Chicago.

"Endorsed: April 14th, 1927, paid hereon by check, $500.00
June 13th, 1927, paid hereon by check, $500.00"

upon the ground that the same was secondary evidence and no proper foundation was laid therefor, in that it was not shown that the same had been lost or destroyed; and that it affirmatively appeared [203] from the evidence that after the death of Graham Foster, former attorney for the plaintiff, his effects passed into the hands of his surviving wife, and no showing was made that the same was not yet in her possession nor were her depositions taken in the premises, and for the further reason that it did not appear that the plaintiff was the owner and holder of said note.

VII.

That the Court erred in admitting in evidence in behalf of the plaintiff, over the objection and exception of the defendant, the copy of note set up on page 8 of plaintiff's second amended complaint, the

same being read into the evidence from the complaint and being in words and figures as follows:

"$5000.00 Chicago, Illinois, Oct. 30, 1917

On or before June 30, 1919, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker at The St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.

"It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

"The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

(Sgd) HOVAL A. SMITH
CLEVE W. VAN DYKE

No. 5793
P. O. Bisbee, Ariz.
Miami, Arizona.

"Endorsed: May 21st, 1927, paid
hereon by check, $500.00
July 20th, 1927, by check, $500.00"

upon the ground that the same was secondary evidence and no proper foundation was laid therefor, in that it was not shown that the same had been lost or destroyed; and that it affirmatively appeared from the evidence that after the death of Graham Foster, former attorney for the plaintiff, his effects

passed into the hands of his surviving wife, and no showing was made that the same was not yet in her possession nor were her depositions taken [204] in the premises, and for the further reason that it did not appear that the plaintiff was the owner and holder of said note.

VIII.

That the Court erred in finding judgment for the plaintiff herein, in that the judgment of the Court is not sustained by the special findings of fact of the Court, and in Finding of Fact number 5, which said Finding of Fact reads as follows:

> "That after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note in a written instrument in the following words and figures:
>
> "January 1, 1927
>
> "Mr. Hoval A. Smith
> care Senator Ralph H. Cameron,
> Senate Office Building
> Washington, D. C.
>
> "My dear Hoval:
>
> "Mr. Bascom Parker, of Niles, Michigan, arrived in Miami a few days ago asking the settlement of two notes of $5,000 each, given to him Chicago, August 30, 1917, in payment for his stock in the Calhoun Timber Company. You will recall this deal.

"This stock was purchased for the remaining stockholders of the company at the request of Mr. H. C. Olcott, acting for the trustees of the bondholders of the Calhoun Timber Company. The amount to be paid for this stock was $50,000; $25,000 of which was to be in Calhoun Timber Company bonds which were owned by the Calhoun Timber Company and $10,000 in cash, and $15,000 in three $5,000 notes. These notes were to be the joint obligation of yourself, Mr. Lubiens and myself. The cash paid to Mr. Parker was a check against the $100,000 fund in the St. Ansgar Bank which we had had borrowed from Thomas F. Cole, of New York. These notes were to have been paid when due. One of them came due in the following June and was sent out to me to Miami for collection. I paid this note. The two other notes have never been paid and form the basis of a demand on the part of Mr. Parker for payment at this time.

"The stock was delivered and was transferred on the books of the company. One third of the stock was delivered to yourself, one-third to R. C. Lubiens, and one-third to myself. After the company became defunct the $100,000 owed to Thomas F. Cole became due and as you know I have paid this sum, so that puts me now in the position of having paid $15,000 or the $25,000 that was owing to Mr. Parker. After the first note was paid the other two notes were taken over by the St. Ansgar Bank, through

Lubiens. Later one of them was sent to me for collection by the St. Ansgar Bank. I refused to pay the same [205] at the time because I already paid the share due from me and later I paid a further sum of $10,000 which was the original cash paid to Mr. Parker.

"The notes were returned to the St. Ansgar Bank from the Gila Valley Bank of Miami, the bank to whom they were sent for collection. The refusal was based upon the grounds that I did not owe the money, that the stock had been turned over to Mr. Lubiens and that he owed the money for the amount due, as I had paid my share in full.

"Later on there were some differences between the St. Ansgar Bank on this Calhoun Timber Company matter and yourself and myself. Mr. Lubiens, who was the treasurer of the company, and who was mutually trusted by us at the time, had gathered together a lot of notes which he had placed in the bank and which had been signed by us at various times, and for which we had received no consideration and for which the Calhoun Timber Company had received no consideration. In my opinion at the time this matter was brought to my attention by you and Mr. Salisbury, the whole matter was a fraud and that the bank could not hold me for any amount.

"Time went on and at your insistence an agreement was reached between ourselves and

the St. Ansgar Bank. In order to avoid litigation we agreed to a settlement between the bank and ourselves with the understanding that all notes and obligations were to be included within this settlement. No notice has ever been received by me from the Bank of St. Ansgar or from Mr. Lubiens that they had not taken up these notes when they were refused payment by me for the cause stated above. I was under the impression that Mr. Lubiens and bank, having been notified by me that it was their obligation, had assumed these notes and that they were still held by them and was part of the consideration upon which our settlement was based. What was my surprise to learn the other day upon the arrival of Mr. Parker that the bank, instead of including these notes in our settlement as I presumed was being done, had returned the notes to Mr. Parker unpaid. And now Mr. Parker has presented these notes to me for payment.

"Now, Hoval, I have tried to be patient in this matter, I have tried to be fair; I have assumed more than my share of the obligation of this disastrous enterprise. I have carried the loan for you; I have carried the loan for the bank and had paid out practically all the cash money which has been paid out since the final crash of the company. I have secured not one nickel or one dime in salvage from the company and I have gone so far as to pay the

$100,000 to Mr. Cole which was a joint obligation of yourself, the bank and myself.

"I presumed the bank was trying to adjust this thing fairly and on a basis of equity and trying to clear up a nasty mess. When Mr. Parker arrived I [206] explained to him fully what my relationship to the bank was on these matters. I told him that we now have due and payable a note to them of $10,000. He has notified me that we must not make this payment to the bank until his matter is adjusted.

"I am writing you to inform you of the situation. I request now that you you feel obligated to Mr. Parker to fulfill my statement to him that we will not pay this note to the Bank of St. Ansgar until the matter is adjusted. In other words I request that you, upon your return to Arizona, stop at St. Ansgar, see Mr. Salisbury and present this matter to him. Mr. Parker would have levied upon this payment that we were about to make to the bank of St. Ansgar had I not stipulated to him as stated above. I suggest that you now have a definite understanding with Mr. Salisbury in reference to this matter. I expect them to treat Mr. Parker as fairly as I have treated them. Our agreement with Mr. Parker was definite. Our arrangement among ourselves was well understood and Mr. Parker is only asking for his rights and what is legitimate. The fact of the matter is I am very much surprised indeed at

the action taken by the bank in this matter, especially after the settlement that has been made between them and us. We were trying to seek a way out of our difficulties and the way out unloaded over a quarter of a million dollars of obligations upon myself, which, while it is unfair, was arranged in order to avoid troublesome litigation and a long period of contest and fighting. As you know, we discussed the matter and we decided that it would take a large sum of money and a long time to work out this litigation. My health was poor, your affairs were involved, times were hard and we felt that we might better make an amicable settlement rather than seek our dues in the court. It may be that Mr. Salisbury does not know about this situation, and if he does not, you should apprise him of it and clarify it as soon as passible.

"With kindest personal regards, I am

Yours very truly,

CLEVE W. VAN DYKE."

"That the promissory note set forth in Finding 3 is one of the promissory notes mentioned and described in the foregoing instrument. Said instrument was written, signed and delivered by defendant, Cleve W. Van Dyke, to the plaintiff at Miami, in the County of Gila, State of Arizona, on the first day of January, 1927,"

the said written instrument so set up in said Finding of Fact number 5 is not such an acknowledg-

ment under Section 2068 of the Revised Code of Arizona, 1928, which requires that when an action is barred by limitation no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted [207] in evidence to take the case out of the operation of the law unless such acknowledgment be in writing and signed by the party to be charged thereby; said instrument not containing any acknowledgment of the justness of the claim nor being signed by defendant appellant, nor containing any express or implied promise to pay the notes which are the subject matter of this action.

Nor is said judgment sustained by special Finding of Fact No. 12, reading as follows:

> "That after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note in the written instrument which is set forth in Finding No. 5 upon the First Cause of Action and is one of the promissory notes mentioned and described in said written instrument. Said instrument was written, signed and delivered by defendant Cleve W. Van Dyke to the plaintiff at Miami, in the County of Gila, State of Arizona, on the first day of January, 1927,"

in that the instrument therein referred to is the instrument set up in Haec Verba in said Finding of Fact No. 4, and said instrument not being such

an acknowledgment under Section 2068 of the Revised Code of Arizona, 1928, which requires that when an action is barred by limitation no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law unless such acknowldgment be in writing, and signed by the party to be charged thereby, said instrument not containing any ackonwledgment of the justness of the claim nor being signed by defendant appellant, nor containing any express or implied promise to pay the notes which are the subject matter of this litigation.

IX.

That the Court erred in making its Finding of Fact No. 4, reading as follows, to-wit:

> "That said note was given for a valuable consideration and at the time of the commencement of this action the plaintiff was and still is the owner and holder thereof, and that no part thereof has been paid except the sum of One Thousand Dollars ($1,000.00) paid in two installments of Five Hundred Dollars ($500.00) each at the dates set forth in the endorsements thereon." [208]

upon the ground that there was no evidence to sustain said Finding of Fact, and particularly the Finding of Fact that the plaintiff was still the owner and holder of said promissory note.

X.

That the Court erred in making its Finding of Fact No. 11, reading as follows, to-wit:

> "That said note was given for a valuable consideration and at the time of the commencement of this action the plaintiff was and still is the owner and holder thereof, and that no part thereof has been paid except the sum of One Thousand Dollars ($1,000.00) paid in two installments of Five Hundred Dollars ($500.00) each at the dates set forth in the endorsements thereon."

upon the ground that there was no evidence to sustain said Finding of Fact, and particularly the Finding of Fact that the plaintiff was still the owner and holder of said promissory note.

XI.

That the Court erred in making said Finding of Fact No. 5; that after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note in a written instrument set up in said Finding of Fact (which said written instrument is set up in Haec Verba in our Assignment of Error number VIII), in that said Finding of Fact is not sustained by the evidence, in that the same is based upon plaintiff's Exhibit No. 4 introduced in evidence, a photostatic copy of which is herein set up in our Assignment of Error Number V, (and in order to avoid repetition the said photo-

static copy is not again set up but is made a part of this Assignment of Error by reference to said Assignment of Error No. V), and it appearing therefrom that the said instrument was neither written nor signed by said defendant Cleve W. Van Dyke nor was the same a completed instrument, in that a space was left thereon for his signature in the event that he approved of the draft thereof, and that the typewritten signature at the bottom thereof was [209] never adopted by him, and there is no evidence in this case showing that he adopted said typewritten signature; and for the further reason that the said instrument was inadmissible in evidence under the provisions of Section 2068 of the Revised Code of Arizona, 1928, and was not competent evidence to arrest the running of the statute of limitations pleaded by the defendant Cleve W. Van Dyke in his demurrer to plaintiff's first and second amended complaint and in his answer to the merits of the plaintiff's first and second amended complaint, and therefore is not competent evidence to sustain said Finding of Fact.

XII.

That the Court erred in making its Finding of Fact No. 6 in that portion thereof reading as follows:

> "That the said defendant Cleve W. Van Dyke intended to adopt and did adopt his name written in typewriting at the foot of said instrument as his signature, and did thereby sign the same,"

upon the ground that there is no evidence in the record to support this portion of said Finding of Fact No. 6.

XIII.

That the Court erred in making its Finding of Fact No. 13 in that portion thereof reading as follows:

> "That the said defendant Cleve W. Van Dyke intended to adopt and did adopt his name written in typewriting at the foot of said instrument as his signature, and did thereby sign the same,"

upon the ground that there is no evidence in the record to support this portion of said Finding of Fact No. 13.

XIV.

That the Court erred in making its Finding of Fact No. 16, reading as follows:

> "That both of said promissory notes were lost since the commencement of this action and the same cannot be found after diligent search and inquiry, but that the evidence establishes the form and language of said notes as set forth in the foregoing findings," [210]

in that there is no evidence in the record to support said Finding of Fact.

XV.

That the Court erred in its Conclusion of Law No. 1, reading as follows, to-wit:

> "That the promissory notes set forth in the first and second cause of action are not, nor is either of them, barred by the statute of limitations of the State of Iowa or the State of Arizona, but that the same are now valid and subsisting obligations,"

in that said Conclusion of Law is contrary to the laws of the State of Arizona and particularly to Section 2068 of the Revised Code of Arizona, 1928, and contrary to the general law of the land in that all matters of limitation and remedy are governed by the law of the forum.

XVI.

That the Court erred in its Conclusion of Law No. 2, reading as follows:

> "That the instrument dated January 1st, 1927, written and signed by the defendant Cleve W. Van Dyke is a sufficient memorandum in writing signed by the said defendants to arrest the running of the statute of limitations and to start the period of limitation to running anew under the law of the State of Iowa,"

in that said Conclusion of Law is erroneous in that the law of the State of Iowa has no extra territorial effect, and that the sufficiency of an instrument to arrest the running of the statute of limitations must

be governed by the law of the forum, namely, the law of the State of Arizona, and that the instrument dated January 1st, 1927, is not sufficient under the laws of Arizona to arrest the statute of limitations pleaded by the defendant in this cause.

XVII.

That the Court erred in its Conclusion of Law No. 3, reading as follows:

> "That the instrument dated January 1st, 1927 [211] written and signed by the defendant Cleve W. Van Dyke is a sufficient memorandum in writing signed by the said defendants to arrest the running of the statute of limitations and to start the period of limitation to running anew under the law of the State of Arizona,"

in that the said Conclusion of Law is erroneous and contrary to the statutes of Arizona and to the decisions of the Supreme Court of Arizona interpreting Section 2068 of the Revised Code of Arizona, 1928.

XVIII.

That the Court erred in its Conclusion of Law No. 4, reading as follows:

> "That the absence of the defendant Cleve W. Van Dyke from the State of Arizona prevented the operation of the statute of limitations during the period of such absences, and that neither of said notes was barred by limitations,"

in that the absence of the defendant Cleve W. Van Dyke from the State of Arizona had no bearing upon the operation of the statute of limitations, as said cause of action, as appears from the evidence and record herein, was barred long prior to the filing of plaintiff's complaint in this action.

XIX.

That the Court erred in its Conclusion of Law No. 5, reading as follows:

> "That the plaintiff is entitled to judgment against the defendant Cleve W. Van Dyke for the sum of Eight Thousand Dollars ($8000.00), being the unpaid principal of said two promissory notes, with interest at the rate of seven per cent (7%) per annum from the maturity thereof as therein provided until paid, less the sum of One Thousand Dollars ($1000.00) paid upon each of said notes, and for a reasonable attorney's fee in the amount fixed by the Court at the sum of Two Thousand Dollars ($2000.00), and for the costs of this action,"

in that the same is contrary to the laws and statutes of Arizona as applied to the facts in this case, as shown by the record, evidence and pleadings therein.

WHEREFORE, defendant appellant prays that said judgment may [212] be reversed and set aside, and that judgment be entered in favor of defendant appellant as against the plaintiff appellee; that the

plaintiff appellee take nothing under his complaint or under these proceedings, and that the defendant appellant have his costs incurred in said cause, and for such other and further relief as to the Court may seem just and proper.

DATED, this 22nd day of April, 1935.

CHARLES L. RAWLINS,
GEO. H. RAWLINS,
THOMAS W. NEALON,
Attorneys for Defendant,
Cleve W. Van Dyke.

SERVICE of copy of the above and foregoing Assignment of Errors is admitted this 22nd day of April, 1935.

GEORGE R. DARNELL,
Darnell & Nave
SAMUEL L. PATTEE,
L. V. ROBERTSON,
S. L. Pattee
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 22, 1935. [213]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST ON APPEAL BOND

Upon motion of Charles L. Rawlins, George H. Rawlins and Thomas W. Nealon, attorneys for defendant Cleve W. Van Dyke, and upon filing petition for appeal and assignment of errors:

IT IS HEREBY ORDERED that an appeal be, and hereby is, allowed to the United States Circuit

Court of Appeals for the Ninth Circuit in accordance with said petition from the judgment in this cause, made and entered on the 22nd day of November, 1934, (motion for new trial having been filed and served upon the plaintiff on the 30th day of November, 1934, and denied by said Court on the 12th day of February, 1935), by which it is Ordered, Adjudged and Decreed that the plaintiff Bascom Parker do have and recover of and from the defendant Cleve W. Van Dyke the principal sum of Eight Thousand and no/100 Dollars ($8,000.00), together with interest in accordance with the terms of the promissory notes set forth in plaintiff's Second Amended Complaint herein, amounting in all, both principal and interest, at the date of said judgment, to the sum of Eighteen Thousand Seven Hundred Sixty-seven and 68/100 Dollars ($18,767.68); and that said principal sum of Eight Thousand and no/100 Dollars ($8,000.00) bear interest from the date of said judgment until paid at the rate of seven per cent per annum; and that the plaintiff Bascom Parker have and recover from the defendant Cleve W. Van Dyke the [214] further sum of Two Thousand and no/100 Dollars ($2,000.00), attorneys' fees in said action, together with the costs of said action, taxed at the sum of Two Hundred Nine and 55/100 Dollars ($209.55); and that a certified transcript of record be by the Clerk of this Court transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, California; and

IT IS FURTHER ORDERED that Five Hundred and no/100 Dollars ($500.00) be, and hereby is, fixed as the amount of the bond on appeal, and upon the defendant Cleve W. Van Dyke giving said bond on appeal, conditioned as required by law, and it having been approved by this Court and filed herein, the same shall operate as a cost bond.

Dated at Tucson, Arizona, this 22nd day of April, 1935.

ALBERT M. SAMES,
United States District Judge.

SERVICE of a copy of Order Allowing Appeal and Fixing Amount of Cost on Appeal Bond admitted this 22nd day of April, 1935.

GEORGE R. DARNELL,
SAMUEL L. PATTEE,
Darnell & Nave
LAWRENCE V. ROBERTSON,
S. L. Pattee
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 22, 1935. [215]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, CLEVE W. VAN DYKE, as principal, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, as surety, are held and firmly bound unto the above named plaintiff-appellee-Bascom Parker in the sum of Five Hundred and no/100 ($500.00) Dollars, for the payment of

which well and truly to be made, we bind, ourselves, our and each of our heirs, representatives, successors and assigns, jointly, severally and firmly by these presents.

Sealed with our seals and dated this 22nd day of April, 1935.

WHEREAS, the above named Cleve W. Van Dyke, defendant-appellant is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the final judgment in the above entitled cause, rendered in favor of the plaintiff Bascom Parker and against the defendant Cleve W. Van Dyke on the 22nd day of November, 1934, (motion for new trial having been filed and served upon the plaintiff on the 30th day of November, 1934, and denied by said Court on the 12th day of February, 1935), and duly entered in the office of the Clerk of the United States District Court for the District of Arizona, on the said 22nd day of November, 1934; and

WHEREAS, the said defendant Cleve W. Van Dyke, principal [216] obligor herein, after the entry and filing of said judgment, duly filed and timely presented to this court his petition praying for the allowance of an appeal for the review of said judgment by the United States Circuit Court of Appeals for the Ninth Circuit, and said appeal was duly and timely allowed by the Honorable Albert M. Sames, presiding Judge of the United States District Court for the District of Arizona, upon the said defendant Cleve W. Van Dyke giving bond according to law in the sum of Five Hundred and no/100

($500.00) Dollars, which said bond shall operate as a cost bond.

NOW, THEREFORE, if the said Cleve W. Van Dyke shall prosecute his said appeal to effect, and if he fails to make his plea good, shall answer all damages and costs herein, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

CLEVE W. VAN DYKE,
Principal.

(Seal) FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By F. E. Scrivner,
Attorney-in-fact.

Attest:

.....

Approved April 22nd, 1935.

ALBERT M. SAMES,
Judge U. S. District Court.

[Endorsed]: Filed Apr. 22, 1935. [217]

[Title of Court.]

November, 1934 Term At Tucson

MINUTE ENTRY OF APRIL 22, 1935.
(Globe General Minutes)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

ORDER APPROVING BOND ON APPEAL.

The defendant Cleve W. Van Dyke by his counsel having presented to the Court his bond on appeal,

executed on the 22nd day of April, 1935, in the sum of Five Hundred Dollars ($500.00), with Fidelity and Deposit Company of Maryland, a corporation, as surety thereon,

IT IS ORDERED that said bond be and the same is hereby accepted and approved. [218]

[Title of Court and Cause.]

PRAECIPE INDICATING PORTIONS OF THE RECORD TO BE INCORPORATED IN THE TRANSCRIPT.

To the Clerk of the District Court of the United States for the District of Arizona:

CLEVE W. VAN DYKE, defendant and appellant, files this his Praecipe, and indicates the portion of the record to be incorporated in the Transcript of Record and transmitted to the Circuit Court of Appeals for the Ninth Circuit within the time provided therefor by law, or such time as extended by proper order of the above entitled court:

1. Complaint, filed Jan. 21, 1931.

2. Defendants' Demurrer to Complaint, filed March 7, 1931.

3. Second Amended Complaint, filed Aug. 26, 1931.

4. Defendant's Demurrer to First and Second Cause of Action of Plaintiff's Second Amended Complaint, filed Aug. 31, 1931.

5. Memorandum Ruling, filed June 17, 1932.

6. Answer of Defendant Van Dyke, filed Nov. 15, 1932.

7. Motion for Rehearing on Demurrer, filed Dec. 15, 1932.

8. Plaintiff's Objections to Rehearing on Demurrer, filed Jan. 10, 1933.

9. Defendants' Motion for an Inspection of Letter Sued Upon, filed Jan. 21, 1933.

10. Defendant's Motion for Inspection of Notes Sued Upon, filed Feb. 21, 1933.

11. Amended Answer, filed Mar. 13, 1933.

12. Plaintiff's Reply, filed Mar. 14, 1933. [219]

13. Stipulation Waiving Jury, filed June 2, 1933.

14. Plaintiff's Proposed Special Findings of Fact and Conclusions of Law, filed Oct 2, 1934.

15. Defendant's Objections to Plaintiff's Proposed Special Findings of Fact and Conclusions of Law, filed Oct. 18, 1934.

16. Defendant's Motion to Set Aside Preliminary Order and Enter Judgment for Defendant, filed Oct. 18, 1934.

17. Defendant's Proposed Findings of Fact and Conclusions of Law, filed Oct. 18, 1934.

18. Special Findings of Fact and Conclusions of Law, filed Nov. 22, 1934.

19. Judgment, filed Nov. 22, 1934.

20. Defendant Cleve W. Van Dyke's Motion for New Trial, filed Nov. 30, 1934.

21. Affidavit of Service of Motion for New Trial, filed Jan. 3, 1935.

22. Stipulation to extend time to file and settle Bill of Exceptions and Docket Appeal, to May 1, 1935; filed Feb. 25, 1935.

23. Order extending time for preparing and filing, etc. of Bill of Exceptions to and including May 1, 1935, filed Feb. 25, 1935.

24. Order extending time to Docket Appeal to and including May 1, 1935, filed Feb. 25, 1935.

25. Stipulation extending time for presentation, settlement and allowance or approval of Bill of Exceptions, for docketing appeal, and extending November 1934 term of court, filed April 22, 1935.

26. Order extending November 1934 Term of Court, filed Apr. 22, 1935.

27. Order extending time for presentation, settlement and allowance or approval of Bill of Exceptions, filed Apr. 22, 1935.

28. Order extending time for docketing appeal, filed Apr. 22, 1935.

29. Petition for Appeal, filed Apr. 22, 1935.

30. Assignment of Errors, filed Apr. 22, 1935.

31. Order allowing appeal and fixing amount of cost on appeal bond, filed Apr. 22, 1935.

32. Bond on Appeal, filed Apr. 22, 1935.

33. Citation on Appeal, filed Apr. 22, 1935.

34. Bill of Exceptions when settled and approved by the Court and made a part of the record.

35. Certificate of the United States District Judge to Bill of Exceptions and Order Approving, Settling and Allowing [220] and Making same a part of the Record herein.

36. Stipulation extending defendant's time to Oct. 19, 1934, to file proposed amendments to plaintiff's Special Findings of Fact, etc., filed Oct. 9, 1934.

37. Order extending defendant's time to Oct. 19, 1934 to file proposed amendments, filed Oct. 10, 1934.

38. Defendant's consent to continuing hearing on Motion for New Trial, filed Dec. 10, 1934.

39. This Praecipe.

40. Affidavit of Service of Praecipe.

41. Minute entry of April 27, 1931, sustaining demurrer, etc.

42. Minute entry of June 17, 1932, sustaining demurrer, etc.

43. All minute entries of January 16, 1933.

44. All minute entries of January 30, 1933.

45. All minute entries of June 2, 1933.

46. All minute entries of June 3, 1933.

47. All minute entries of September 15, 1934.

48. All minute entries of November 10, 1934.

49. All minute entries of December 8, 1934.

50. All minute entries of December 20, 1934.

51. All minute entries of February 12, 1935.

52. All minute entries subsequent to February 25, 1935.

CHARLES L. RAWLINS
GEO. H. RAWLINS
THOMAS W. NEALON
Attorneys for Defendant
Cleve W. Van Dyke.

[Endorsed]: Filed May 11, 1935. [221]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING COPY OF PRAECIPE TO ATTORNEYS FOR PLAINTIFF.

State of Arizona,
County of Maricopa.—ss.

HELEN ERICKSON, being first duly sworn, deposes and says:

That she is over the age of twenty-one years, and is law clerk to Thomas W. Nealon, one of the attorneys for Cleve W. Van Dyke, defendant in the above entitled cause:

That on the 10th day of May, 1935, she placed in an envelope properly addressed to Darnell & Pattee, Consolidated National Bank Building, Tucson, Arizona, with sufficient postage thereon, a copy of the Praecipe Indicating Portions of the Record to be Incorporated in the Transcript, in the above entitled matter;

That affiant duly deposited said envelope containing said copy in the United States Post Office at Phoenix, Arizona; that on said date she mailed the original of said copy to the Clerk of the United States District Court, at Tucson, Arizona; that there is a regular service by mail between Phoenix, Arizona, and Tucson, Arizona, the points of origin and destination of said document so mailed.

HELEN ERICKSON

Subscribed and sworn to before me this 10th day of May, 1935.

[Seal] FRANCES M. GARDNER
Notary Public.

My commission expires: April 5, 1938. [222]

[Endorsed]: Filed May 11, 1935. [223]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET APPEAL

PURSUANT to stipulation heretofore filed in this cause,

IT IS HEREBY ORDERED that the time for docketing the appeal in the above entitled and numbered cause be, and the same is hereby extended to and including the 1st day of May, 1935.

Done in open Court this 25th day of February, 1935.

ALBERT M. SAMES
United States District Judge.

[Endorsed]: Filed Feb. 25, 1935. [224]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING APPEAL.

IT IS HEREBY ORDERED that the time for docketing the appeal in the above entitled and numbered cause, be and the same is hereby extended to and including the 1st day of June, 1935.

Done in open Court this 22nd day of April, 1935.

ALBERT M. SAMES
Judge of the United States District Court.

[Endorsed]: Filed Apr. 22, 1935. [225]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

In the United States District Court for the District of Arizona

United States of America,
District of Arizona.—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Bascom Parker, Plaintiff, versus Hoval A. Smith and Cleve W. Van Dyke, Defendants, numbered L-202 Globe, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 229, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $35.00 and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the Seal of the said Court this 27th day of May, 1935.

[Seal] J. LEE BAKER, Clerk,
United States District Court,
District of Arizona. [226]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States of America to Bascom Parker, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from and after the date of this citation, pursuant to an order allowing an appeal, duly made, entered and filed in the office of the above named District Court on the 22nd day of April, 1935, which said appeal is from the judgment of said District Court in the above numbered and entitled case, made and entered on the 22nd day of November, 1934, (motion for new trial having been filed and served upon the plaintiff on the 30th day of November, 1934, and denied by said Court on the 12th day of February, 1935), by which said judgment it is Ordered, Adjudged and Decreed that the plaintiff Bascom Parker do have and recover of the defendant Cleve W. Van Dyke the

principal sum of Eight Thousand and no/100 Dollars ($8,000.00), together with interest in accordance with the terms of the promissory notes set forth in plaintiff's Second Amended Complaint herein, amounting in all, both principal and interest, at the date of said judgment to the sum of Eighteen Thousand Seven Hundred and Sixty-seven and 68/100 Dollars ($18,767.68); and that said prin-
[227] cipal sum of Eight Thousand and no/100 Dollars ($8,000.00) bear interest from the date of said judgment until paid at the rate of seven per cent per annum; and that the plaintiff Bascom Parker have and recover from the defendant Cleve W. Van Dyke the further sum of Two Thousand and no/100 Dollars ($2,000.00) attorneys' fees in said action, together with the costs of said action, taxed at the sum of Two Hundred Nine and 55/100 Dollars ($209.55), to show cause, if any there be, why said judgment should not be reversed and set aside, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Albert M. Sames, United States District Judge for the District of

Arizona, at Tucson, this ..... day of April, 1935.

[Seal] ALBERT M. SAMES,
United States District Judge.

SERVICE of Citation on Appeal is acknowledged this 22nd day of April, 1935.

GEORGE R. DARNELL,
SAMUEL L. PATTEE,
LAWRENCE V. ROBERTSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 22, 1935. [228]

[Endorsed]: No. 7879. United States Circuit Court of Appeals for the Ninth Circuit. Cleve W. Van Dyke, Appellant vs. Bascom Parker, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed May 29, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.